IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1894

FORT PIERCE UTILITIES AUTHORITY OF THE CITY OF FORT PIERCE, THE GAINESVILLE-ALACHUA COUNTY REGIONAL ELECTRIC WATER AND SEWER UTILITIES, THE LAKE WORTH UTILITY AUTHORITY, THE UTILITIES COMMISSION OF NEW SMYRNA BEACH, THE ORLANDO UTILITIES COMMISSION, THE SEBRING UTILITIES COMMISSION, and the CITIES OF ALACHUA, BARTOW, FORT MEADE, KEY WEST, LAKE HELEN, MOUNT DORA, NEWBERRY, ST. CLOUD AND TALLAHASSEE, FLORIDA, and the FLORIDA MUNICIPAL UTILITIES ASSOCIATION,

v. *Petitioners,*

UNITED STATES OF AMERICA AND THE NUCLEAR REGULATORY COMMISSION

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The Opinion of the Court of Appeals is captioned *Ft. Pierce Utilities Authority of the City of Ft. Pierce, et al.* v. *United States of America and the Nuclear Regulatory Commission*, Nos. 77-1925, 77-2101 (D.C. Cir. Mar. 23, 1979). (Appendix A, at A-1-A-36). The Order of the Nuclear Regulatory Commission reviewed by the D.C. Circuit in Docket No. 77-1925 is an unreported letter order from Edson G. Case, Acting Director, Office of Nuclear Reactor Regulation to Robert A. Jablon, Esq. (September 9, 1977), denying an Order to Show Cause and attached as Appendix C-1, p. A-38 (R859).[1] The Order of the Nuclear Regulatory Commission under review in Docket No. 77-2101 is *Florida Power & Light Company* (St. Lucie Plant, Unit No. 1, Turkey Point Plant, Units No. 3 and 4), ALAB-428, 6 N.R.C. 221 (1977, Appeal Board Decision, R832-843), Commission review denied, 6 N.R.C. 538 (R934-935). The Appeal Board Decision is Appendix C-2, at A-41-A-48; the Commission order is Appendix C-3, at A-49-A-56. The Commission's Opinion in *Houston Lighting & Power Co.* (South Texas Project), CLI-77-13, 5 N.R.C. 1303 (1977), on which the Appeal Board relied, is Appendix C-4, A-51-A-81.

JURISDICTION

The judgment of the Court of Appeals was entered March 23, 1979 (Appendix B, at A-37). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and §189 of the Atomic Energy Act, 42 U.S.C. §2239. Jurisdiction is also conferred pursuant to §10 of the Administrative Procedure Act, 5 U.S.C. §§702-706.

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[1]Designations "(R ____)" are to the record below. "Decision" refers to the Court of Appeals opinion at Appendix A-1.

QUESTIONS PRESENTED

1. In view of (a) the expressed intent of Congress in the Atomic Energy Act that governmentally developed nuclear power not be used to further monopolization and (b) the explicit language of §186(a) of the Atomic Energy Act, 42 U.S.C. §2236(a), that "any license may be revoked . . . because of conditions revealed . . . which would warrant the Commission to refuse to grant a license on an original application" and related statutory provisions, did the Court of Appeals correctly hold that the Nuclear Regulatory Commission is totally without power to even consider whether antitrust conditions should be ordered with respect to nuclear licenses initially issued as "research and development" licenses under §104 of the Act, 42 U.S.C. §2134?

2. If in passing the 1970 Amendments to the Atomic Energy Act strengthening the Nuclear Regulatory Commission's prelicensing antitrust jurisdiction, Congress ordered automatic antitrust review in connection with all new nuclear reactor license applications, but failed to order immediate automatic antitrust review with regard to previously licensed units, is Congress deemed to have eliminated *post-licensing* antitrust review under §186 of the Atomic Energy Act, 42 U.S.C. §2236(a), under circumstances where (1) Congress did not amend §186 of the Act; (2) the Joint Committee on Atomic Energy had been requested to amend that section; (3) the authoritative court decision interpreting §186 *(Cities of Statesville* v. *AEC*, 441 F. 2d 962, 974 (D.C. Cir. 1969) (*en banc*) had previously stated that §186(a) "invests the Commission with a continuing 'police' power over the activity of its licensees and provides it with the ability to take remedial action if a license is being used to restrain trade" and (4) the Joint Committee appended that decision to its report?

3. Is the Court of Appeals justified in developing an interpretation of the Atomic Energy Act that was raised but expressly *not* relied upon by the Commission?

STATUTES INVOLVED

The principle statute involved is the Atomic Energy Act, §186(a)-(b), 42 U.S.C. §2236(a)-(b):

> (a) Any license may be revoked for any material false statement in the application or any statement of fact required under section 2232 of this title, or because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application, or for failure to construct or operate a facility in acordance with the terms of the construction permit or license or the technical specifications in the application, or for violation of, or failure to observe any of the terms and provisions of this chapter or of any regulation of the Commission.
>
> (b) The Commission shall follow the provisions of section 9(b) of the Administrative Procedure Act in revoking any license.

Other relevant sections of the Atomic Energy Act referred to in the text are §§ 1, 2, 3, 102-105, 107, 161, 183, 185-188 of the Act, 42 U.S.C. §§2011-2013, 2132-2135, 2137, 2201, and 2233, 2235-2238. These are set forth in Appendix D at A-83-A-103.

SUMMARY OF PROPRIETY OF RELIEF REQUESTED

Petitioners, Florida Cities,[2] seek review of a decision at the Court of Appeals for the District of Columbia Circuit, which held that broad remedial provisions of the Atomic Energy Act, providing for a reopening of nuclear plant licenses, have no antitrust applicability, at least insofar as licenses for nearly all presently operating nuclear units are concerned. Since the Atomic Energy Act specifically seeks to prevent the use of nuclear licenses to violate the antitrust laws and since the legislative history of the Act demonstrates that Congress knew that the remedial provisions of the Act cover antitrust concerns, Supreme Court review is warranted. Such review is especially justified since nuclear technology has been largely developed and paid for by the Government and licensed without cost to private utilities with the express statutory purpose that its benefits are to be disseminated broadly.

STATEMENT OF THE CASE

With the exception of the Florida Municipal Utilities Association, a membership organization, petitioners Florida Cities each own and operate electric systems for the benefit of their residents and ratepayers.

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[2]Florida Cities include the Fort Pierce Utilities Authority of the City of Fort Pierce, the Gainesville-Alachua County Regional Electric Water and Sewer Utilities, the Lake Worth Utility Authority, the Utilities Commission of New Smyrna Beach, the Orlando Utilities Commission, the Sebring Utilities Commission, and the Cities of Alachua, Bartow, Fort Meade, Key West, Lake Helen, Mount Dora, Newberry, St. Cloud and Tallahassee, Florida, and the Florida Municipal Utilities Association.

Florida Cities differ greatly in size ranging from the Orlando Utilities Commission, having generating capacity of 746 Mw and nearly 84,000 presently metered customers (R26), to very small distribution systems (R26-27).

Florida Power & Light Company ("FP&L") is one of the largest electric utilities in the United States and the largest in Florida (R28-29).[3].

Faced with a series of anticompetitive actions by FP&L which threatened to put them out of business, on August 6, 1976, Florida Cities sought antitrust review by the Nuclear Regulatory Commission ("NRC")[4] of FP&L's licenses to

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[3]According to the Department of Justice:

> Applicant [FP&L] calls itself "the nation's fastest growing electric utility." Florida's rapid growth has been concentrated in the area in which it serves; and for the past several years, the applicant has added more new customers than any other electric utility in the United States. Applicant's projected peak load for 1980 is 14,475 Mw over twice its 1972 load and generating capacity is planned to increase more than 10,000 Mw to meet that load.

Advice Letter concerning Florida Power & Light's application for a construction permit for its St. Lucie Plant,Unit No. 2 (November 14, 1973), pp. 2-3 (R.28-29)

[4]The Nuclear Regulatory Commission is the successor to the Atomic Energy Commission ("AEC"). For convenience, the NRC is used to include the AEC. Florida Cities requested relief before the Commission pursuant to §§104, 185-188 of the Atomic Energy Act, 42 U.S.C. §2134, 2235-2238. (R.21-22, 62-66, 282-283, 346-348). They sought review before the District of Columbia Circuit pursuant to §189 of the Atomic Energy Act, 42 U.S.C. §2239, and §10 of the Administrative Procedure Act, 5 U.S.C. §1009.

operate various nuclear units pursuant to §186 of the Atomic Energy Act, 42 U.S.C. §2236, among other sections, which states:

> Any license may be revoked. . . because of conditions revealed. . . which would warrant the commission to refuse to grant a license on a original application. . . or for violation of, or failure to observe any of the terms and provisions of this chapter or of any regulation of the Commission.

In their joint petition seeking such license review, Florida Cities submitted evidence showing that FP&L has a nuclear monopoly (R74-81), that it controls transmission and coordination (R28-29, 69), and that it uses such control to limit Florida Cities' power supply opportunities and markets (R89-99). They demonstrated numerous violations of antitrust law and policy, including past and present acquisition efforts (R79-85), unlawful territorial agreements (R86-89) and unlawful refusals to deal (R41-42, 89-99). They submitted other evidence showing the unlawful purpose and intent of FP&L's conduct (R29-33, 68-97, 273, 277, 342-344). They alleged that FP&L is using the advantage it possesses as a result of its nuclear monopoly to attempt to acquire smaller independent systems (*e.g.*, R30-31, 77-81), and to prevent smaller systems from acquiring alternative power supply resources (*E.g.*, R31, 89-94)[5]. However, in *Houston Lighting & Power Co.* (South Texas

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[5]The above citations are to Florida Cities' Joint Petition, which summarized the grounds of their allegations. For purposes of appellate review, these allegations must be taken as true. In addition, Florida Cities submitted voluminous affidavits and documentary evidence, referred to in the Joint Petition, in support of their contentions (R507; *e.g.*, Joint Appendix, 434-493). In connection with Florida Cities' late intervention in *Florida Power & Light Co.* (St. Lucie Plant, Unit No. 2), Docket No. 50-389A, 5 NRC 789 (1977), *aff'd.* ALAB-420, 6 NRC 8 (Appeal Bd., 1977), *aff'd*, CLI-78-12, 7 NRC (1978) where Florida Cities have made the same allegations, the

Project Unit Nos. 1 and 2) CLI-77-13, 5 N.R.C. 1303 (1977) (Appendix C-4) (hereinafter *South Texas*) the commission ruled that §186 has no relevant[6] antitrust applicability. Based upon

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Department of Justice states:

> In the present case [St. Lucie 2], there is little doubt that sufficient allegations have been made against FP&L to constitute a situation inconsistent with the antitrust laws that would be created or maintained by the license activities, if they are proven. FP&L has allegedly denied access to nuclear units to virtually all publically-owned competing electric systems, generally refused to wheel, refused specific wheeling requests, attempted to induce other systems to refuse to wheel, placed unlawful restrictions in wholesale power contracts, refused to sell wholesale power on over a half dozen occasions, preconditioned the sale of wholesale power on anticompetitive terms, subjected competitors to a price squeeze, engaged in illegal territorial agreements and otherwise denied competitors access to coordinated operation and development in an attempt to acquire those competing systems. Furthermore, the Licensing and Appeal Boards had before them a substantial amount of documentary evidence which demonstrated that most of the above-noted allegations have a substantial basis in fact and are not frivolous.

(Response of the Department of Justice (November 11, 1977 at 10-11). On the basis of such evidence, the NRC Licensing Board concluded with regard to that proceeding:

> . . . the interests of these petitioners, and in fact the public interest in Florida, cannot adequately be protected without a hearing to consider fully the serious antitrust issues raised by the Joint Petition. *Id.*, 5 N.R.C. at 798.

[6]The Commission recognizes some antitrust authority under §186, such as in instances of license application, frauds and concealments, license violations and license amendments. *South Texas, supra*, 5 N.R.C. at 1311, 1318. The Commission does not explain why §186 provides it with this much antitrust authority, but no more.

the Commission's *South Texas* decision, the NRC Appeal Board ordered Florida Cities' complaint dismissed. *Florida Power & Light Company* (St. Lucie Plant, Unit No. 1, Turkey Point Plants, Unit Nos. 3 & 4), ALAB-428, 6 N.R.C. 221 (1977) (R832-843). Appendix C-2.

In a very narrow decision — overly so in Florida Cities' judgement — the Court of Appeals for the District of Columbia reinterpreted the grounds of the Appeal Board's decision and then affirmed on the basis of its reinterpretation.

The Court of Appeals "reserve[d] judgment" on whether §186 generally authorizes license revocation on antitrust grounds, but strongly implies that it does. *Decision*, at 26 n. 15, 30; App. A. at A-26, n. 15, A-30A; *See also Decision* at A 9, n. 5; App. A. A 9, n. 5. However, as to the licenses involved in this case, the Court of Appeals found that §186 post-licensing antitrust review authority does not apply because (1) §186 authorizes revocation only on the same grounds that might have authorized denial of the original license application and (2) the original licenses, which in this case were issued as "research and development" licenses, retain their status[7], so that §186 has no applicability to the FP&L "research and development" operating licenses. "[O]n this alternative ground for decision, and this ground alone" (*Decision* at 30), the court below affirmed the Commission's decision[8].

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[7]Atomic Energy Act, §102(b), 42 USC §2132(b).

[8]The Court of Appeals found that the Commission had sufficiently "indicate[d]" this ground as providing "an alternative ground for decision" to provide a basis for affirmance. *Decision* at 29. App. A, p. A-29 Florida Cities submit, that while the grounds advanced by the Court of Appeals may represent an interesting compromise between conflicting positions whether licensed nuclear units are subject to antitrust review, the grounds advanced by the court below were specifically *not* relied upon by the Commission. *Florida Power & Light*

The Court's decision leaves the Cities to compete against Florida Power & Light utilizing decreasing available supplies of natural gas or oil, while FP&L utilizes three operating nuclear units, generating energy at approximately 2 mills per kwh[9] See *infra* at 18. Under the Court of Appeals decision, the Commission not only could refuse to consider allegations of FP&L's use of its nuclear advantage to put them out of business; it can even refuse to consider the impact of FP&L's proposed tariff filings at the Federal Energy Regulatory Commission to severely restrict the sale to Florida Cities of electricity at wholesale generated in large part from FP&L's nuclear units. This result, Florida Cities submit, is plainly contrary to antitrust law and policy and to the requirements of the Atomic Energy Act. (R939-948, 974-975.)

Nor is the impact of the D.C. Circuit's decision limited to Florida. Of the 70 nuclear electric plants licensed to operate in the United States, it is believed that 63 were originally licensed as research and development units and under the decision below are therefore freed from antitrust regulation[10]. NRC Office of Management and Program Analysis, *Facilities License Application Record* (December 31, 1978). The court below would thus allow a major portion of the electric power industry to be released from NRC antitrust regulation.

The court of Appeals found, however, that Florida Cities are not without an avenue of relief stating (*Decision*, at 30-31, App. A, A-30-A-31):

Co. (St.Lucie Plant Unit No. 1, Turkey Point Plant, Units No. 3 and 4), 6 N.R.C. 221, 225 (R832, 839): "But even accepting everything [Florida Cities] say, no construction of Section 186 need be made here." App. C-2, p. A-45.

[9] *1977 Florida Power & Light Co. SEC Form 10-K Report*, at 3. The figures for natural gas and oil were 7 mills and 21-26 mills, respectively.

[10] Five research and development plants qualified for prelicensing antitrust review under §105 (c)(8) of the Atomic Energy Act, 42 U.S.C. §2135(c)(8). See the Chart at the end of this petition, pp. 30-36, *infra*.

> To so immunize the licenses here from post-licensing antitrust review under §186a is not, as Florida Cities assert, to give FP&L a "carte blanche" to use [its] facilities directly contrary to the antitrust laws". Section 105a not only provides that nothing in the Act preempts the normal operation of the antitrust laws, but also vests the Commission with authority to revoke or modify FP&L's operating licenses in the event that a Court finds that FP&L has violated those laws in the course of licensed activity. Moreover, the Commission, acting pursuant to Section 105(b) has already forwarded Florida Cities' antitrust allegations to the Justice Department.[11]

On May 22, 1978, in *Gainesville Utilities Dep't.* v. *Florida Power & Light Co.*, 573 F.2d 292 (1978), *cert. denied*, ____ U.S. ____ ,99 S.Ct. 454, (1978), the Fifth Circuit held "that the evidence compels a finding that FP&L was part of a conspiracy with Florida Power Corporation (Florida Power) to divide the wholesale power market in Florida." Subsequent to this decision by order of July 27, 1978, the Commission requested that it be advised by the parties whether to hold an antitrust proceeding under §105(a), 42 U.S.C. §2135(a)[12]..After receiving both responses and replies, and after the Commission had taken

[11] The *Gainesville Utilities Dept.* Decision, *infra*, finding that FP&L had violated §1 of the Sherman Act, 15 U.S.C.§1, had been lodged with the Court of Appeals for the District of Columbia below. Order (June 16, 1978).

[12] *Florida Power & Light Co.* (St. Lucie Plant, Unit Nos. 1 and 2; Turkey Point Plant, Unit Nos. 3 and 4), CLI-78-16, 8 N.R.C. 6 (1978). Section 105(a) of the Atomic Energy Act, 42 U.S.C. §2135(a) states: "In the event a licensee is found by a court of competent jurisdiction . . . in an original action in that court . . . to have violated any of the provisions of [certain antitrust laws] in the conduct of the licensed activity, the Commission may suspend, revoke, or take such action as it may deem necessary with respect to any license issued by the Commission under the provisions of this chapter."

no action, and after denial of certiorari in *Gainesville Utilities Dep't., supra*, on November 29, 1978, undersigned counsel wrote the Secretary of the Nuclear Regulatory Commission requesting action on the Commission's order requesting advice of six months before. By motions dated March 28, 1979 and April 2, 1979, Florida Cities again moved that the Commission act pursuant to its §105(a) authority. Over one year after the *Gainesville* decision, the Commission still has not ruled on these motions[13].

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[13]The Commission has made a major interpretation of the Atomic Energy Act, denying that it has antitrust enforcement authority over all outstanding FP&L operating licenses. The D.C. Circuit has narrowed the decision so that it applies only to so-called "research and development" licenses. Contrary to the implications of their names, these licenses constitute all operating licenses issued before the effective date of the 1970 amendments to the Atomic Energy Act and do not refer to the present technological or economic status of the licensed plants. Thus, these "research and development" licences are for nearly all of the operating nuclear units in the United States. Where there is a statute enunciating specific and particular concern for antitrust principles and containing very broad remedial provisions permitting the reopening of licenses for cause, Florida Cites submit that the reading of antitrust authority out of these remedial provision swarrants Supreme Court review.

The D.C. Circuit is correct that in the event of an adverse antitrust finding against a licensee by a Court of competent jurisdiction, the Commission has additional remedial authority to "suspend, revoke or take such other action as it may deem necessary." It should be noted that despite the clear Fifth Circuit decision in *Gainesville Utilities Dep't*, FP&L has contested the applicability of such decision to these licenses and the Commission has failed to take action. Under these circumstances, whatever unarticulated premises may have been assumed in favor of a general NRC post-license antitrust review authority, since the Commission has failed to act even under its undeniable §105(a) powers, review here is especially appropriate and warranted.

I. Reasons for Granting the Writ

This case raises important jurisdictional questions of the interpretation of the Atomic Energy Act. The Writ should be granted (1) because the Court of Appeals affirms the Commission's refusals to consider serious allegations of anticompetitive abuse of Nuclear Regulatory Commission granted licenses, contrary to the express language of the Atomic Energy Act; (2) because the legislative history of the Atomic Energy Act shows a specific concern to protect against misuse of governmentally developed nuclear technology; and (3) because there are substantial public issues involved in the interpretation of the antitrust responsibilities of the Nuclear Regulatory Commission.

II. The Atomic Energy Act Grants The Commission the Authority to Investigate Antitrust Abuse By its Licensees

The language of the Atomic Energy Act is explicit that operating licenses may be reopened for cause. Section 186 of the Atomic Energy Act, 42 U.S.C. §2236 states:

> Any license may be revoked. . . because of conditions revealed. . . which would warrant the Commission to refuse to grant a license on an original application, . . . or for violation of, or failure to observe any of the terms and provisions of this chapter or of any regulation of the Commission.[14]

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[14]Other related statutory language reinforces the statutory mandate that the Commission exercise continued responsibility for the protection of the public against misuse of licenses. For example, §183, 42 U.S.C. §2233 (d), provides:

"Every license issued under this chapter shall be subject

Florida Cities have raised allegations such that "the facts revealed. . . would warrant the Commission to refuse to grant a license. . . " §186, 42 U.S.C. §2236.

The Atomic Energy Act expresses the statutory purpose that the benefits of nuclear power be made available as broadly as possible. After stating: "Atomic energy is capable of application for peaceful as well as military purposes," in §1 of the Act, 42 U.S.C. §2011, Congress declares "the policy of the United States" to be, among other things, that "the development, *use*, and control of atomic energy shall be directed so as to make the *maximum* contribution to the general welfare." In §3, 42 U.S.C. §2013, Congress further defines the purposes of the Act as encouraging "*widespread participation* in the development and

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to . . . all of the other provisions of this chapter, *now or hereafter in effect* and to all valid rules and regulations of the Commission." (Emphasis supplied).

§187, 42 U.S.C. §2237, states:

"The terms and conditions of all licenses shall be subject to amendment, revision, or modification, by reason of amendments to this chapter or by reason of the rules and regulations issued in accordance with the terms of this chapter."

§161(o), 42 U.S.C. §2201 (o) grants the Commission authority to require reports and keep records "of activities under licenses issued pursuant to Sections . . . 2133[103], and 2134[104] of this title, as may be necessary to effectuate the purposes of this chapter, including Section 135 (105) of this title."(Emphasis supplied). Section 104 concerns "research and development licenses", 42 U.S.C. §2134, and §105 contains the Act's antitrust standards, including the declaration in §105a, 42 U.S.C. 2135a, that licensees are not relieved from the operation of the antitrust laws. 42 U.S.C. §2135.

In addition, Section 161(c), 42 U.S.C. §2201 (c), gives the Commission broad administrative, investigatory and enforcement authority. Section 161(p), 42 U.S.C. §2201 (p), grants procedural regulatory authority "as may be necessary to carry out the purposes of the chapter."

utilization of atomic energy for peaceful purposes to the *maximum extent* consistent with the common defense and security and with the health and safety of the public." (Emphasis supplied throughout).

Moreover, the Act "contains specific caveats urging the Commission to act in the public interest by promoting 'free competition in private enterprise.'" *Cities of Statesville* v. *AEC*, 441 F.2d 962, 972 (D.C. Cir. 1969) (*en banc*). When, in spite of specific statutory provisions setting forth Congressional concerns that the benefits of nuclear development not be limited to a restricted few, and that nuclear licenses may be reopened for cause, a Court of Appeals' decision excludes nearly every license to operating a nuclear plant from N.R.C. antitrust review, this Court's certiorari authority should be exercised.[15]

The Court of Appeals decision should be reviewed for additional reasons, not the least of which is the variance between its rationale and that of the Commission. *Burlington Trucklines, Inc.* v. *United States*, 371 U.S. 156 (1962).[16]

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[15]In light of the clarity of the Atomic Energy Act's language providing for post-licensing review, it is not suprising that the D.C. Circuit expressly refused to hold as the Commission had argued that the NRC has no post-licensing remedial antitrust authority (with the limited exceptions referred to at p. 8, n. 5, *supra*). Rather, the Court held that since under §102 "research and development" licenses maintain their legal status even after they become economically commercial, FP&L's licenses are effectively "grandfathered" and its activities are beyond the ambit of NRC antitrust control. *Decision* at 20-24, App. A., A-2024.

[16]The argument that "antitrust considerations were not grounds for refusing operating licenses to such "research and development utilities" was raised by the NRC Appeal Board. However, that Board expressly declined to hold that this consideration overrode the Commission's authority under §186. Instead, it rejects Florida Cities' arguments on the basis of the Commission's *South Texas* decision,

Moreover the line drawn by the D.C. Circuit to allow for possible §186 authority over *only* post-1970 licensed units is

holding that "the Commission's antitrust authority is not defined by the broad powers contained in §186, but by the more limited scheme set forth in §105." *Florida Power & Light Company*, (ST. Lucie Plant, Unit No. 1), 6 N.R.C. 221, 225, 226 (quoting *South Texas, supra*, 5 N.R.C. at 1317, R832, 841.) App. C-2 at A-46. Indeed, the NRC Appeal Board that ruled on Florida Cities' joint petition seemed exceedingly troubled by the reasoning underlying the *South Texas* decision, stating:

> "Were this a matter of first impression, Florida Cities' arguments could not be brushed aside lightly. One need look no further than Judge Leventhal's concurring opinion in Statesville, *supra*, for an impressive collection of authorities for the proposition that (441 F. 2d at 987):
>
> > a statute providing for licensing or other regulation is presumed to permit a consideration of antitrust principles, with the harmonizing approach just outlined, unless a contrary intent appears expressly or by necessary implications.
>
> *Accord: Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 759-61 (1973)." *Florida Power & Light co.*, 6 N.R.C. at 224-225 (R837). App. C-2, at A-44-A-45. However, the Appeal Board concluded: "Whether we agree with [FloridaCIties'] arguments or not, they are made in the wrong forum.
>
> > "Unless and until the Commission elects to modify its *South Texas* rulings, or is instructed by Congress or the Courts, this Board is, or course, *constrained* to apply them." *Id.* at 227 R842, emphasis supplied). App. C-2 at A-47

Thus, the Court of Appeals' decision rests upon grounds not adopted by the Appeal Board and an interpretation different from the Commission's interpretation of the statute, which the Appeal Board felt "constrained" to follow. Further, the Appeal Board indicated considerable doubt as to the correctness of the Commission's decision. The above would appear to be a thin reed on which to base an antitrust exclusion in connection with the licensing of "three large commercial power plants to operate for 40 years . . . without ever having given thought to the resulting anticompetitive ramifications." *Supra*, 6 N.R.C. at 224 (R836-7). App. C-2 at A-44.

blatantly discriminatory as among those subject to the Act. Under the Court of Appeals' holding, those injured by grantees of NRC "research and development" licenses, issued before the effective date of the 1970 amendments, have no Commission protection against antitrust abuse; however, licenses issued after that date (as commercial licenses) are subject to post-licensing antitrust review. In practical terms, the ruling of the Court of Appeals turns economics topsy-turvy, since units licensed before 1970 would tend to be the least expensive units, potentially most giving rise to antitrust abuse. Seventy licenses for such units have been granted to 41 utilities (excluding co-owners) in 25 states.[17] Further, these licenses had no initial antitrust controls placed upon them, since future regulation was anticipated. Atomic Energy Act, §186, 42 U.S.C. §2236. *Cities of Statesville, supra*, 441 F.2d 962.

The exclusion of "research and development" plants from post-licensing antitrust review is directly contrary to the language of §186, which refers to "all licenses," making no distinction between "research and development" and "commercial" licenses. Section 186 authorizes revocation on the same grounds as refusal to grant "an original application" (not *the* original application), and it is evident that the plants in question would be subject to antitrust scrutiny if they were now the subject of an original application. Moreover, there is nothing in the statute which prohibits application of antitrust concerns to "research and development" licenses[18]. "Research and development" projects are freed by the Act from *pre-licensing* antitrust review, in order to expedite the projects. But

[17]See Chart, Attachment A.

[18]Atomic Energy Act Sec. 104(b), 42 U.S.C. §2134(b), provides that such licenses shall "impose the minimum amount of such regulation and terms of license *as will permit the Commission to fulfill its obligations under this Chapter.*" (Emphasis supplied) *See* Judge Leventhal's concurring opinion in *Cities of Statesville, Supra*, 441 F2d at 979. *See Florida Power & Light co., supra*, 6 NRC at 225-226, App. C-2 at 44-45.

neither the project nor the licensees are thereby immunized from antitrust obligations. Atomic Energy Act, §105(a), 42 USC 2135(a). It thus makes no sense to deprive the NRC of post-licensing antitrust authority. The technical distinctions inferred by the D.C. Circuit and attributed to the 1970 amendments make no regulatory or antitrust sense, where the facility is now commercial (not merely "research and development") and can have antitrust impacts. It should be again stressed that these plants that were initially licensed under §104 as "research and development" facilities are among the most economic generating units in the United States.[19] Thus, the "practical consequences"[20] of assuming that Congress intended to exclude them from NRC antitrust regulation are to pose a direct threat to the continued existence of many smaller competing electric systems.

The Court of Appeals ignores allegations of record that FP&L has used the economic power derived from its nuclear monopoly to take over smaller electric systems,[21] and assumes that in passing the 1970 Amendments, Congress intended to modify the antitrust content of §186 to exclude previously

[19]Older units would tend to have far lower capital costs than would new units. FP&L's energy costs associated with its operating nuclear plants are approximately two mills per kwh, compared with less than seven mills for natural gas and 21 mills for oil. *1977 Florida Power & Light Co., SEC Form 10-K* 3 (*See* R446-464 for comparisons of generation costs).

[20]*Sunray Oil Co.* v. *FPC*, 364 U.S. 137, 143 (1978).

[21]In an "open letter to every Vero Beach resident" two days before an election held for this purpose, FP&L asked voters to approve its proposed purchase of the Vero Beach electric system, despite a proposed FP&L rate increase, citing: "We expect to have a new nuclear generating unit at St. Lucie in service in the near future. This should bring an annual fuel savings of more than $100 million that will be passed directly to our customers . . . " (R342, 343).

issued licenses. But Congress left that section intact and the section itself contains no such exclusion. Judicial findings of repeal of statutes by implication are not favored. *Morton* v. *Mancari*, 417 U.S. 535, 549-550 (1974).

Moreover, the telling judicial and legislative history of the 1970 antitrust amendments to the Atomic Energy Act belie any possible interpretation that Congress intended to limit the Commission's post-licensing review authority. Prior to 1970 the Atomic Energy Act made a distinction between "research and development" and commercial licenses. The Commission had held that it did not have to consider antitrust matters *at all* in conjunction with the issuances of research and development licenses. Indeed, prior to the 1970 amendments, the Commission had *never* declared a license commercial, and, therefore, subject to antitrust review. In 1969 in *Cities of Statesville* v. *AEC*, 441 F.2d 962 (1969), the D.C. Circuit, *en banc*, perhaps with some skepticism, affirmed the Commission's holding that certain plants could be licensed as "research and development" rather than "commercial" facilities. However, the Court "warned" the Commission that when these nuclear plants become commercial, "then the Commission must consider, under §105(c), anticipatory antitrust impact". Further the court states:

> Finally, under §186a, 42 U.S.C. §2236a (1964), the Commission has the power to revoke any type of license it has issued when there is a "violation of, or failure to observe any of the terms and provisions" of the Act. This section invests the Commission with the continuing "police" power over the activity of its licensees and provides it with the ability to take remedial action if a license is being used to restrain trade. *Statesville, supra*, 441 F.2d at 974.

Disturbed by the above state of affairs, Congress revised the Atomic Energy Act to provide that *all* new applications for NRC construction permits *must* go through antitrust review, thereby eliminating the distinction between "research and development" and "commercial" licenses. However, it legislated that existing licenses retain their status. Therefore, upon becoming commercial such licenses did not have to go through an immediate, automatic antitrust review. Atomic Energy Act §102, 42 U.S.C. §2132[22].

The Court of Appeals holds that because Congress did not subject all existing units to *automatic* antitrust prelicensing review under §105, 42 U.S.C. §2135, by inference Congress is deemed to have eliminated the *preexisting* remedial authority under §186.[23]

The Court of Appeals ignores that its own *Statesville* decision had established the judicial determination of the meaning of §186 when the 1970 amendments were enacted. Since it was legislating to correct the Commission's failure to exercise its antitrust responsibilities, Congress could hardly have been unaware of the *Cities of Statesville* determination

[22]Absent such provision, antitrust review would have been automatically required when units were declared commercial, or alternatively, when an operating license was applied for. Atomic Energy Act, §105, 42 U.S.C. §2135.

[23]It reaches this result through interpreting the "conditions revealed" clause of §186(a), 42 U.S.C. §2236(a) "which would warrant the Commission to refuse to grant a license on an original application..." to refer to "an original application" for §104 research and development license, *Decision* at 20, App. A. A-20. Of course, there are no such licenses for research and development power plants anymore. Apart from its circularity, acceptance of the premise makes meaningless a phrase designed to apply current facts as a basis for exercising regulatory authority over previously issued licenses.

that under §186 the Commission has continuing antitrust responsibility. Indeed, the Committee attached the *Cities of Statesville* decision to its report. *Prelicensing Antitrust Review of Nuclear Power Plants: Hearings before the Joint Committee on Atomic Energy*, 91st Cong., 1st and 2nd Sess. (1969-1970), at 603-604 (Hereafter cited as "1970 Joint Committee Hearings"). Thus, Congress was plainly endorsing the *Statesville* determination that under §186 "all" licenses are subject to post-licensing antitrust authority.

In passing the 1970 amendments, the Joint Committee on Atomic Energy did not modify §186 or any other *post-licensing* provisions of the Atomic Energy Act. It is repeatedly made clear in the Joint Committee on Atomic Energy Hearings that the 1970 amendments dealt *only* with the authority of the Commission to conduct antitrust review *before* licensing and that only *pre-licensing* as opposed to *post-licensing* would be affected. *E.g.*, 1970 Joint Committee Hearings, at 1-2, 4, 13-14, 120-121, 419-420, 629.

Moreover, witnesses stressed to the Joint Committee both when §186 was enacted in 1954[24] and again during consideration of the 1970 amendments that §186 contained a continuing discretionary authority in the Commission to reopen licenses on non-safety related grounds[25].

[24]"Statutes are construed by Courts with reference to the circumstances existing at the time of passage." *Gemsco, Inc.*, v. *Walling*, 324 U.S. 244, 265 (1945); *United States* v. *Wise*, 370 U.S. 405, 411 (1962).

[25]For example, in conjunction with the 1954 amendments, the Joint Committee had requested the American Bar Association to submit suggestions concerning amendments to the 1946 Act. E. Blythe Stason, Dean of the University of Michigan Law School, appearing on behalf of the American Bar Association Special Committee on Atomic Energy (which included a former chairman of the Atomic Energy Commission), stated:

> The revocation powers are very broad indeed — so broad as to imperil the foundation for private investment in atomic

During Congressional consideration of the 1970 antitrust amendments to the Atomic Energy Act, the New York City Bar Association specifically recommended to the Joint Committee on Atomic Energy that Congress modify the Commission's post-licensing authority, which Congress declined to do.

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enterprises. Licenses will be much more valuable as such foundation, and at the same time essential public interests, can be properly guarded by them, by following the provisions of the Federal Communications Act pursuant to which revocation can be effectuated only for willful or repeated violations and then only after due notice and hearing *Legislative History of the Atomic Energy Act of 1954* (Public Law No. 703, 83rd Congress). U.S. Atomic Energy commission, Washington, D.C. 1955, at 1699 (referred to as "*1954 Legislative History*", *infra*).

Paul W. McQuillen, then Chairman of the Legal Committee, Dow Chemical-Detroit Edison and Associates Atomic Power Development Project stated:

> Perhaps the most serious aspects of the license provisions are those contained in sections 186 and 187. Those sections, in substance, empower the Commission to amend, revise, or revoke and annul any license *for almost any reason*. There is no guide set forth for the exercise of administrative discretion, except that section 186 clearly indicates that a license may be revoked for a purely technical and inadvertent variation in construction or specifications or conflict with any regulation, including any future regulation *1954 Legislative History*, at 1747 (emphasis supplied). See also *1954 Legislative History* at 1963, 2084.

Testifying on behalf of the Special Committee on Atomic Energy of the Association of the Board of the City of New York, Oscar M. Ruebhausen stated:

> Even greater difficulties are presented by the general revocation provisions of sections 186 and 187. These sections make any license . . . .
>
> 4. Revocable for failure to observe any of the terms of the act or any regulation of the Commission this includes regulations or amendments adopted even after the license issues and *is not limited to matters required by the common*

In a description of the law as it stood before enacting the proposed amendment, the Bar Association included a section entitled, "Effect of Proposed Legislation on the Present Statute," stating in part:

> 6. Other Relevant Sections. Neither of the bills makes substantive changes in the following provisions of the present statute:
>
> (a) Section 161o, which permits the Commission to require licensees to furnish reports on the licensed activities. Such reports could be used to obtain information as to whether the licensee is complying with the antitrust laws.
>
> . . . .
>
> (d) Section 186a, which provides, among other things, that any license granted by the Commission may subsequently be revoked because of conditions which would warrant the Commission to refuse to grant the license or for violation of any of the terms and provisions of the Act. It is noteworthy that in the recent decision in *Cities of Statesville* v. *AEC* the majority opinion of the U.S. Court of Appeals for the District of Columbia Circuit stated that this section ". . . invests the Commission with a continuing 'police' power over the activity of its licensees and provides it with the ability to take remedial action if a license is

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defense or national health and safety. *1954 Legislative History* at 2034.

Following the testimony of a number of knowledgeable and interested witnesses, the Joint Committee surely was aware of the broad interpretation of which these provisions are capable. In response to specific suggestions, the Joint Committee in fact modified §186. As initially drafted, §186(a) provided that a license ". . . may be revoked for any false statement in the application . . . " 1954 *Legislative History*, at 165. It was recommended that licenses should be revocable only for material false statements *Id.* at 1861, and this suggestions was adopted by the Joint Committee. *Id.* at 733. However, Congress left the remainder of proposed sections 186 and 187 unaltered.

> being used to restrain trade." *Such broad power under section 186a would apparently be additional to, and not limited by, section 105a,* which authorizes the Commission to "suspend, revoke, or take such other action as it may deem necessary with respect to any license" in the event that a licensee is found by a court of competent jurisdiction to have violated any provisions of the antitrust laws in the conduct of the licensed activity.

1970 Joint Committee Hearings at 604-605 (footnote citing *Statesville* omitted, emphasis supplied).

Although the Bar Association did not include any suggestions as to §186 in the text of its recommendations, it was careful to footnote that section to make clear that both the AEC and Joint Committee bills dealt only with the Commission's *pre-licensing* authority, thus leaving its post-licensing authority intact and that any change in the Commission's post-licensing authority would have to be accomplished through amending §186. 1970 *Joint Committee Hearings* at 624-625[26]. The Joint Committee appended the Bar Association's comments to the 1970 Legislative History.

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[26]Thus, the Bar Association recognized that Congress was considering only the Commission's pre-licensing authority and that, unless amended, §186 would provide ongoing post-licensing authority. In footnote 35 the Bar Association states:

> The Committee's comments, including the recommendations set forth in this Part III, are addressed to the aspects of the present Act, the AEC bill and JCAE bill pertaining to *pre-licensing* review of antitrust matters by the AEC. It appears important, however, to clarify also the extent of the Commission's continuing jurisdiction over antitrust matters after a license is issued (see discussion of section 186a, page 6, *supra*). If such jurisdiction is to extend beyond remedial action to be taken by the Commission pursuant to section 105a after a court has found that the licensee has violated the antitrust laws, *the legislation should set forth as explicitly as practicable the standards and scope of the Commission's post-licensing antitrust review*, particularly since the considerations pertinent to such review are not identical to those pertinent to the pre-licensing review. 1970 Joint Committee Hearings at 629. (Emphasis supplied.)

The above legislative history[27] precludes the inference that in passing the 1970 Amendments to the Act, Congress intended to amend §186 by implication and to reverse the *Statesville* decision, *supra*, 441 F.2d 962 (which authorized post-licensing revocation on grounds such as antitrust activity), without changing a word of §186. Yet the Court of Appeals has concluded otherwise. Review is necessary to vindicate this Congressional purpose, especially where such interpretation effectively seeks to limit antitrust regulatory authority over the already highly concentrated electric power industry. *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747 (1973).

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[27]These important facets of the legislative history are not discussed in the courts decision below. The Court of Appeals emphasized instead the restraints that the 1970 amendments imposed on *pre-licensing* antitrust review for "research and development" applications and concluded that those restraints reached §186 through the reference to "an original application", *Decision*, at 21-22, App A, pp. A-21 A-22. But that reference should apply in the manner construed by the Court of Appeals, if at all, only if the project remains "research and development" in the practical sense so that it has no substantial commercial effect and thus no antitrust review would be warranted. "Research and development" licenses retain that characterization according to §102 of the Act; but, as noted above, that characterization only relieves the projects of the antitrust review before they are relicensing proven commercial.

Finally, in assessing the grounds for review, it should be considered that in 1961 in *Power Reactor Development Co. v. International Union*, 367 U.S. 396, this Court held, first, that the Joint Committee on Atomic Energy had a "peculiar responsibility" and knowledge as to the Atomic Energy Act and, second, that its failure to modify §185 (which is closely related to §186, but applies to construction permits rather than to operating licenses) was determinative of a Congressional intent to let stand an interpretation permitting subsequent reopening of licenses after construction.

> It may often be shaky business to attribute significance to the inaction of Congress, but under these circumstances, and considering especially the peculiar responsibility and place of the Joint Committee on Atomic Energy in the statutory scheme we think it fair to read this history as a *de facto* acquiescense in and ratification of Commission's licensing procedure by the Congress. 367 U.S. at 409.

In reaching this conclusion (367 U.S. at 410-411), the Court relies on the same legislative history as do Florida Cities to support a holding permitting a reopening of nuclear reactors. *Power Reactor Development Co.* is determinative that in passing the 1970 amendments, Congress is presumed to have ratified the *Cities of Statesville* decision, *supra*, 441 F.2d at 974, that §186 provides authority to reopen "research and development" licenses.

Thus, the writ should be granted since the decision below represents a statutory interpretation of a major grant of legislation; since it is contrary to the plain statutory language of the Atomic Energy Act; since it is contrary to a holding of this Court interpreting a related provision of the same Act; since it ignores the legislative history, which establishes that Congress

did not intend to amend the Commission's post-licensing authority or the scope of §186; and since it is premised upon grounds not even relied upon by the agency itself.

III. *Certiorari* Is Further Warranted in Light Of Congressional Concerns That Nuclear Licenses Be Used to Further Pro-Competitive, Humanitarian, Purposes.

All N.R.C. licensees benefit from the huge government investments in nuclear power. Moreover, FP&L is a direct beneficiary of the large governmental investments in nuclear power, most notably, the Westinghouse Shippingport contract for nuclear submarines. Without such investments, it is unlikely that FP&L's Turkey Point 3 & 4 and St. Lucie 1 nuclear plants could have been economically built.[28] Without such investments it is unlikely FP&L's operating nuclear units could have been economically constructed. Thus, in granting nuclear licenses, the Government permits private companies to make use of the fruits of billions of dollars of public investments. The corollary is that recipients of such use of the public domain acquires obligations not to use nuclear power contrary to purposes set forth in the Act.

Because of the size of nuclear reactors, small independent systems such as Florida Cities could not economically construct new nuclear units. However, FP&L and other giant utilities have sufficient loads and financial capabilities to operate such plants, thereby achieving substantial economies.

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[28] E.g., Arthur D. Little, Inc. *Competition in the Nuclear Power Supply Industry, Report to U. S. Atomic Energy Commission, U.S. Department of Justice*, pp. 140-141 (1968). The amounts of N.R.C. subsidies of nuclear development are set forth in the summaries of "AEC Costs Incurred by Principal Prime Contractors" contained in the AEC annual report to Congress, Major Activities in Atomic Energy Programs. FP&L's contractors received millions of dollars of government funding in support of nuclear reactor technology.

Absent corrective action the misuse of nuclear licenses can cause further concentration in the already highly monopolized electric industry, an industry in which predatory conduct by major utilities is not unknown. *See, e.g., Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973).

For these and other reasons, Congress expressly mandated that the NRC take into account antitrust concerns. As the Commission has itself stated:

> In its *Waterford* decisions, the Commission explained the reasons underlying its involvement in antitrust

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Westinghouse Electric Corporation manufactured the turbine generators for all three of the operating units and supplied the nuclear reactor for the Turkey Point units. Combustion Engineering, Inc., supplied the reactor for St. Lucie Unit No. 1. FP&L License Applications for these units. Not only was Westinghouse a major recipient of direct government grants, but Westinghouse's entry into the field of constructing nuclear generators, as well as its acquisition of both plant and experience to permit such construction, resulted directly from its having been:

> . . . operating contractor of the Bettis Atomic Power Laboratory (BAPL), the major facility for developing and building pressurized water reactors [PWR's] for submarine and aircraft carrier applications . . . BAPL was design[at]ed as the contractor to design, develop and construct the reactor for the Shippingport government-owned prototype for commercial power PWR's.

Arthur D. Little, Inc., *Competition in the Nuclear Power Supply Industry, Report of the Atomic Energy Commission, U.S. Department of Justice*, at 140-141 (1968) *See also* Guttman and Willner, *The Shadow Government*, at 20 (Pantheon, 1976).

In its application to construct Turkey Point Units 3 and 4, FP&L cites the Westinghouse experience with pressurized light water reactors, including success of the Westinghouse Shippingport contract in support of its license application (Ex. IV, at 104, App. A):

> matters. "The requirement in Section 105 of the Atomic Energy Act for prelicensing antitrust review reflects a basic Congressional concern over access to power produced by nuclear facilities." *Louisiana Power and Light Company* (Waterford Steam Electric Generating Station, Unit 3), CLI-73-7, 6 AEC 48-49 (1973) (*Waterford I*). The antitrust responsibilities placed on the Commission are "a Congressional recognition that the nuclear industry originated as a Government monopoly and is in great measure the product of public funds. It was the intent of Congress that original public control should not be permitted to develop into a private monopoly via the AEC licensing process, and that access to nuclear facilities be as widespread as possible." *Louisiana Power and Light Company* (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 620 (1973) (Waterford II). *Kansas Gas & Electric Company* and *Kansas City Power & Light Company* (Wolf Creek Generating Station, Unit No. 1, ALAB-279, 1 N.R.C. 559, 564-565 (1975).

Shippingport has demonstrated the remarkable operational stability of the pressurized water reactor under load variations, as well as the ability of the reactor to operate at full power over extended periods. Furthermore, Shippingport has provided an immense amount of knowledge in the fields of reactor physics and fuel technology. The successful performance of the Shippingport core fuel blanket over a seven-year period demonstrated the feasibility of the Zircaloy tubing as cladding in power reactor cores. The burnup attained by blanket assemblies approaching 37,000 megawatt-days per ton in some cases increased confidence in the ability of Zircaloy clad uranium dioxide to withstand very high burnup without ill effects. *Id.* at 3.

The cost differentials between nuclear and fossil fuels are such that if FP&L can continue to monopolize nuclear power and at the same time refuse to deal in power supply services, forcing smaller systems to compete largely with imported oil, such systems' continued independent existence is in jeopardy. *See* p. 18 *supra*. Considering the express purpose of the Atomic Energy Act that the benefits of nuclear power be widely disseminated and the express antitrust concern contained in the statute, Supreme Court review is warranted.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectively submitted,

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THE FORT PIERCE UTILITIES AUTHORITY OF THE CITY OF FORT PIERCE, THE GAINESVILLE-ALACHUA COUNTY REGIONAL ELECTRIC WATER AND SEWER UTILITIES, THE LAKE WORTH UTILITY AUTHORITY, THE UTILITIES COMMISSION OF NEW SMYRNA BEACH, THE ORLANDO UTILITIES COMMISSION, THE SEBRING UTILITIES COMMISSION, AND THE CITIES OF ALACHUA, BARTOW, FORT MEADE, KEY WEST, LAKE HELEN, MOUNT DORA, NEWBERRY, ST. CLOUD AND TALLAHASSEE, FLORIDA, AND THE FLORIDA MUNICIPAL UTILITIES ASSOCIATION.

June 21, 1979

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ATTACHMENT

LICENSED NUCLEAR POWER PLANTS

Of the 70 nuclear power plants licensed to operate as of April 30, 1979, 6 are licensed as commercial facilities and 63 are licensed as research and development plants.[1]

A. Research and Development[2]

Project	Owner	Authorized Power Level MWe(e)
Dresden 1	Commonwealth Edison Co.	200
Yankee-Rowe	Yankee Atomic Power Co.	175
Indian Point 1	Consolodated Edison Co.	65
Humboldt Bay	Pacific Gas & Electric Co.	63
Big Rock Point	Consumers Power Co.	72
San Onofre 1	Southern Califirnia Edison Co..	430
Haddam Neck	Connecticut Yankee Atomic Power Co.	575
LaCrosse	Dairyland Cooperative Power Co.	50
Oyster Creek 1	Jersey Central Power & Light Co.	650
Nine Mile Point 1	Niagara Mohawk Power Power Corp.	610
R. E. Ginna	Rochester Gas & Electric Corp.	490
Dresden 2	Commonwealth Edison Co.	794
H. B. Robinson 2	Carolina Power & Light Co.	700
Monticello	Northern States Power Co.	545

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[1] There are 5 plants currently licensed as research and development plants which did have an opportunity for preliminary antitrust review pursuant to the Atomic Energy Act, §105(c)(8), 42 USC §2135(c)(8) (1973). These plants are Crystal River 3, Oconee 1, 2 and 3, Pilgrim 1, and Brunswick 1 (information obtained from the NRC).

[2] ERDA Division of Nuclear Research and Applications, *U.S. Central Station Nuclear Electric Generating Units, Significant Milestones, April 1977.*

Point Beach 1	Wisconsin-Michigan Power Co.	497
Millstone 1	Northeast Nuclear Energy Co.	660
Dresden 3	Commonwealth Edison Co.	794
Quad Cities 1	Commonwealth Edison Co.	789
Palisades	Consumers Power Co.	805
Quad Cities 2	Commonwealth Edison Co.	789
Surry 1	Virginia Electric & Power Co.	822
Turkey Point 3	Florida Power & Light Co.	693
Pilgrim 1	Boston Edison Co.	655
Vermont Yankee	Vermont Yankee Nuclear Power Corp.	514
Surry 2	Virginia Electric & Power Co.	514
Oconee 1	Duke Power Co.	887
Point Beach 2	Wisconsin-Michigan Electric Co.	497
Turkey Point 4	Florida Power & Light Co.	693
Maine Yankee	Maine Yankee Atomic Powr Co.	790
Browns Ferry 1	Tennessee Valley Authority	1065
Ft. Calhoun 1	Omaha Public Power District	457
Indian Point 2	Consolidated Edison Co.	873
Oconee 2	Duke Power Co.	887
Zion 1	Commonwealth Edison Co.	1040
Peach Bottom 2	Philadelphia Electric Co.	1065
Zion 2	Commonwealth Edison Co.	1040
Prarie Island 1	Northern States Power Co.	530
Ft. St. Vrain	Public Service Co. of Colorado	330
Kewaunee	Wisconsin Public Service Corp.	535
Cooper Station	Nebraska Public Power District	778
Duane Arnold	Iowa Electric Light & Power Co.	538
Three Mile Island 1	Metropolitan Edison Co.	819
Arkansas 1	Arkansas Power & Light Co.	850

Browns Ferry 2	Tennessee Valley Authority	1065
Peach Bottom 3	Philadelphia Electric Co.	1065
Oconee 3	Duke Power Co.	887
Calvert Cliffs 1	Baltimore Gas & Electric Co.	845
Hatch 1	Georgia Power Co.	786
Rancho Seco	Sacramento Municipal Utility District	918
FitzPatrick	Power Authority of the State of New York	821
Cook 1	Indiana & Michigan Electric Co.	1054
Prairie Island 2	Northern States Power CO.	530
Brunswick 2	Carolina Power & Light Co.	821
Millstone 2	Northeast Nuclear Energy Co.	830
Indian Point 3	Power Authority of the State of New York	873
Beaver Valley 1	Duquesne Light Co.	852
St. Lucie 1	Florida Power & Light Co.	802
Browns Ferry 3	Tennessee Valley Authority	1065
Calvert Cliffs 2	Baltimore Gas & Electric Co.	845
Salem 1	Public Service Electric & Gas Co.	1090
Brunswick 1	Carolina Power & Light Co.	821
Crystal River 3	Florida Power Corp.	825
Cook 2	Indiana-Michigan Electric Co.	1060
Three Mile Island 2	Metropolitan Edison Co.	906
B. Commercial		
Trojan	Portland General Electric Co.	1130
Davis-Besse 1	Toledo Edison Co.	906
Farley 1	Alabama Power Co.	829
North Anna 1	Virginia Electric & Power Co.	Fuel loading
Hatch 2	Georgia Power Co.	795
Arkansas 2	Arkansas Power & light Co.	912

[9]ERDA Division of Nuclear Reasearch and Applications, *U.S. Central Station Nuclear Electric Generating Units: Significant Milestones*, April, 1977.

SOURCES:

1. NRC Office of Program Analysis, *Program Summary Report*, NUREG-0380, May 18, 1979.

2. NRC Office of Management and Program Analysis, *Facilities License Aplication Record*, December 31, 1978.

3. ERDA DIvision of Nuclear Research and APplications, *U.S. Central Station Nuclear Electric Generating Units: SIgnificant Milestones*, April, 1977.

APPENDICES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1925

FT. PIERCE UTILITIES AUTHORITY OF THE CITY OF FT. PIERCE, *et al.*, PETITIONERS

v.

UNITED STATES OF AMERICA, and the NUCLEAR REGULATORY COMMISSION, RESPONDENTS

FLORIDA POWER & LIGHT CO.,
CITY OF MOUNT DORA, FLORIDA,
CITY OF LAKE HELEN, FLORIDA,
INTERVENORS

No. 77-2101

FT. PIERCE UTILITIES AUTHORITY OF THE CITY OF FT. PIERCE, *et al.*, PETITIONERS

v.

NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

CITY OF MOUNT DORA, FLORIDA
FLORIDA POWER AND LIGHT CO.,
CITY OF LAKE HELEN, FLORIDA
INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Petitions for Review of Orders of
the Nuclear Regulatory Commission

Argued November 16, 1978

Decided March 23, 1979

Robert A. Jablon, for petitioners.

Stephen F. Eilperin, Solicitor, Nuclear Regulatory Commission, with whom *James L. Kelley*, Acting General Counsel, Nuclear Regulatory Commission, *John J. Powers, III*, and *Andrea Limmer*, Attorneys, United States Department of Justice, were on the brief, for respondents.

J. A. Bouknight, Jr., for intervenor, Florida Power and Light Company.

Also *Robert A. Jablon* and *Daniel Guttman* entered appearances for intervenors, City of Mount Dora and City of Lake Helen.

Before WRIGHT, *Chief Judge*, and, MCGOWAN and WILKEY, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MCGOWAN.

MCGOWAN, *Circuit Judge*: These consolidated petitions for review present two issues: (1) whether section 186(a) of the Atomic Energy Act (Act) vests the Nuclear Regulatory Commission (NRC or Commission) with antitrust authority over operating licenses for nuclear facilities other than that provided in section 105, and (2) if so, whether section 186(a) authorizes postlicensing antitrust review of the section 104(b) operating licenses at issue here.[1]

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[1] The statutory provisions governing the licensing and antitrust review of nuclear facilities are reproduced in full at the conclusion of this opinion. *See* pages 32-36 *supra*.

In No. 77-1925, petitioners, the Florida Municipal Utilities Association and a group of Florida municipalities and municipal electric systems (Florida Cities), challenge a decision of the NRC's Director of Nuclear Reactor Regulation rejecting Florida Cities' request that he initiate proceedings to show cause why operating licenses issued under section 104(b) to intervenor, Florida Power & Light Co. (FP&L), for three nuclear plants—St. Lucie No. 1 and Turkey Point Nos. 3 and 4 (the operating plants)—should not be revoked, amended, or otherwise modified on antitrust grounds pursuant to section 186(a). In No. 77-2101, Florida Cities seek review of a decision of the Atomic Safety and Licensing Appeal Board denying their petition for leave to intervene out of time and for an antitrust hearing under section 186(a) with regard to the operating plants.

For reasons stated below, we conclude that even assuming that section 186(a) vests the Commission with antitrust authority over operating licenses other than that provided in section 105, it does not, by its own terms, authorize postlicensing antitrust review of the section 104(b) operating licenses at issue here. Accordingly, we pretermit the question whether section 105 is the Commission's exclusive grant of antitrust authority over operating licenses for nuclear facilities.

I

The Atomic Energy Act provides for two types of construction permits and operating licenses for nuclear facilities: (1) those issued under section 104(b), known as "research and development" licenses, which are subject only to "the minimum amount of such regulations and terms of license as will permit the Commission to fulfill its [licensing] obligations," and (2) those issued under section 103, known as "commercial" licenses, which are

subject to full-scale Commission regulation.[2] Atomic Energy Act §§ 102-104, 42 U.S.C. §§ 2132-2134 (1976). This licensing scheme, enacted in an era when the practical value of nuclear energy was in doubt, was designed to promote the development of nuclear energy by minimizing the extent of government regulation until such time as its practical value was established. Accordingly, the Act, prior to 1970 when it was amended, authorized the Commission to issue "commercial" licenses under section 103 only upon a finding that "any type of utilization or production facility ha[d] been sufficiently developed to be of practical value for industrial or commercial purposes." Atomic Energy Act, ch. 1073, § 102, 68 Stat. 936 (1954) (amended 1970). Section 104(b), by contrast, authorized the Commission, absent a finding of "practical value," to issue "research and development" licenses, subject to minimum regulation, for "utilization and production facilities involved in the conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes." It was pursuant to section 104(b) prior to the 1970 amendments that FP&L received its construction permits for Turkey Point Nos. 3 and 4 on April 29, 1967, and for St. Lucie No. 1 on July 1, 1970.

In late 1970, Congress amended the Act, abolishing the requirement that the Commission make a finding of "practical value" before issuing "commercial" licenses. Atomic Energy Act § 102(a), 42 U.S.C. § 2132(a) (1976). Thereafter, the Commission, when licensing "utilization and production facilit[ies] for industrial or commercial purposes," was required to issue "commercial" licenses under section 103, rather than "research

[2] The most significant distinction between section 104(b) licenses and section 103 licenses is that the former (with a limited exception not applicable here), unlike the latter, have been, and continue to be, exempt from prelicensing antitrust review under section 105(c). *See* Part II.A *infra*.

and development" licenses under section 104(b). The Act as amended, however, contained a provision authorizing the Commission to issue operating licenses under section 104(b) for nuclear plants that previously had been licensed for construction as "research and development" facilities. *Id.* § 102(b), 42 U.S.C. § 2132(b). Acting pursuant to this grandfather clause, the Commission, on July 19, 1972, April 10, 1973, and March 1, 1976, issued operating licenses under section 104(b) to FP&L for Turkey Point Nos. 3 and 4 and St. Lucie No. 1, respectively.

No one requested, nor did the Commission conduct, an antitrust inquiry in connection with the licensing of the three facilities at issue here. During the period in which FP&L received construction permits for the operating plants, the Act did not expressly authorize the Commission to conduct prelicensing antitrust review for "research and development" facilities. In fact, this court, in *Cities of Statesville v. Atomic Energy Commission*, 441 F.2d 962, 972-76 (D.C. Cir. 1969) (en banc), held that, under the pre-1970 Act, the Commission was not permitted to consider antitrust matters in issuing section 104(b) licenses. This blanket immunity from prelicensing antitrust review for "research and development" facilities was modified in 1970 when Congress, in amending the Act, authorized the Commission to review on antitrust grounds applications for operating licenses under section 104(b) where the party requesting such review previously had sought antitrust review at the construction permit stage and renewed the request in writing within a specified time period. Atomic Energy Act § 105(c)(3), 42 U.S.C. § 2135(c)(3) (1976). The operating licenses at issue here, however, fell outside this limited exception, because, as indicated above, no antitrust objections were raised during the construction permit proceedings.

The first request for antitrust review of the licenses for FP&L's operating plants was made on August 6, 1976, when Florida Cities petitioned the NRC for late intervention, on antitrust grounds, in a construction permit proceeding for another FP&L plant, St. Lucie No. 2, and joined with that petition a request for an antitrust hearing on the three plants that already had received operating licenses. Among other responses to the request for antitrust review of the three operating licenses, the NRC staff and FP&L argued that the request should have been filed not with the Commission as a request for an antitrust hearing, but rather with the Commission's Director of Nuclear Reactor Regulation as a request for a proceeding requiring FP&L to show cause why its operating licenses for the three plants should not be revoked or conditioned. On October 29, 1976, Florida Cities, though insisting that the Commission in fact had jurisdiction, lodged with the Director a copy of its request for antitrust review of the three operating licenses.

The Commission meanwhile referred Florida's Cities' petition of August 6, 1976 to an Atomic Safety and Licensing Board (Licensing Board), which, on April 5, 1977, denied the request for an antitrust hearing on the licenses for the three operating plants.[3] The Licensing Board based this decision on a ruling in another proceeding, *Houston Lighting and Power Co.*, 5 N.R.C. 582, 592 (1977), where the Atomic Safety and Licensing Appeal Board (Appeal Board) held that the Commission had not endowed its licensing boards "with jurisdiction to direct a hearing on antitrust matters—by a grant of an intervention petition or otherwise—in the

[3] The Licensing Board granted Florida Cities' petition for late intervention, on antitrust grounds, in the construction permit proceeding under section 103 for St. Lucie No. 2. That decision, affirmed by the Appeal Board and the Commission, is not before us on the petitions for review in the instant case.

absence of a pending construction permit or operating license proceeding." J.A. 279.

In addition to filing an appeal to the Appeal Board, Florida Cities filed with the Commission itself a motion for "clarification of procedures," seeking, *inter alia*, a declaratory order regarding the most appropriate procedural mechanism to obtain antitrust review of the licenses for FP&L's operating plants. On June 22, 1977, the Commission, ruling that this motion was improperly filed with the Commission, referred it to the Appeal Board or the Director of Nuclear Reactor Regulation for initial consideration.

On August 23, 1977, the Appeal Board both affirmed the Licensing Board's decision denying Florida Cities' request for antitrust review of the three operating plants and disposed of Florida Cities' motion for "clarification of procedures." In affirming the Licensing Board, the Appeal Board relied on its ruling in *Houston Lighting* that, under NRC regulations, a licensing board has no authority, absent a pending construction permit or operating license proceeding, to conduct an antitrust hearing. The Appeal Board then foreclosed the remaining avenues of NRC antitrust review, disposing of Florida Cities' motion for "clarification of procedures" on the statutory ground "that (with certain exceptions not applicable here) once the operating license proceedings terminated this agency's antitrust responsibilities relating to these reactors came to end." J.A. 376. In so construing the Act, the Appeal Board noted (1) that, with certain exceptions not applicable here, Congress, in 1970, had exempted licenses issued under section 104(b) from antitrust review under section 105(c), (2) that the Commission, in its own decision in *Houston Lighting & Power Co.*, 5 N.R.C. 1303 (1977), had ruled that section 105 encompassed all the Commission's antitrust responsibilities, and (3) that, even if the Commission were authorized under section 186(a) to exercise additional

and continuing antitrust responsibilities, it could not invoke that authority here inasmuch as section 186(a), by its own terms, provided for license revocation "because of conditions revealed . . . which would warrant the Commission to refuse to grant a license on an original application," and, according to the Appeal Board, "by Congressional mandate antitrust considerations were not grounds for refusing operating licenses to . . . 'research and development' facilities [such as those at issue here]." The Appeal Board concluded its opinion by noting that the statutory proscription against Commission antitrust review applied with equal force to the Commission's Director of Nuclear Reactor Regulation with whom Florida Cities also had filed its antitrust allegations.

Relying on the reasons set forth in the Appeal Board's decision, the Director of Nuclear Reactor Regulation, on September 9, 1977, denied Florida Cities' request that he institute a proceeding requiring FP&L to show cause why the licenses for the operating plants should not be revoked or modified on antitrust grounds.

On October 26, 1977, the Commission declined to review the Appeal Board's decision but referred Florida Cities' antitrust allegations to the Justice Department.[4]

[4] In the order denying review, the Commission observed:

> In a recent decision, *In the Matter of Houston Lighting & Power Company* (South Texas Project, Unit Nos. 1 & 2), we discussed our antitrust responsibilities, as set forth in Section 105 of the Atomic Energy Act, as amended, 42 U.S.C. 2135. There we stated that "antitrust allegations might be raised outside the license review context. Subsequent allegations that licenses are being used in such a way as to violate the antitrust laws are to be referred to the Department of Justice for investigation and possible enforcement action . . . ." The Florida Cities petition contains such allegations.
>
> The staff is therefore directed promptly to refer to the Attorney General the allegations of the Florida Cities, as well as "any [related] information it may have [if any] with respect to any utilization of special nuclear material or atomic energy which appears to violate or to tend toward the violation" of any of the antitrust laws. 42 U.S.C. 2135(b).

J.A. 411-12.

Following this decision, Florida Cities filed petitions for review of the Appeal Board's decision (No. 77-2101) and the Director of Nuclear Reactor Regulation's refusal to institute show cause proceedings (No. 77-1925). This court granted Florida Cities' motion to consolidate the two petitions and FP&L's motion to intervene in the proceedings.

II

It is undisputed that, on the facts presented here, FP&L's operating licenses are not subject to antitrust review under section 105, a provision cataloguing several areas of Commission antitrust authority in licensing nuclear facilities. Florida Cities, however, argue that section 186(a), a provision governing license revocation, vests the Commission with antitrust authority other than that provided in section 105 and that the operating licenses at issue here are subject to antitrust review under section 186(a). In response, the Commission and FP&L contend (1) that section 105 is the Commission's exclusive grant of antitrust authority in licensing nuclear facilities, and (2) that even if the Commission's antitrust powers are not bounded by section 105, section 186(a) does not authorize postlicensing antitrust review of the section 104(b) operating licenses in question.[5]

[5] Though concurring in the result reached below, the United States, as co-respondent, "does not necessarily concur in the [Commission's] reliance on [its *Houston Lighting*] decision." Respondent's Joint Brief at 8 n.4. It was in *Houston Lighting* that the Commission held that, with limited exceptions not applicable here, its "antitrust authority is defined not by the broad powers contained in Section 186, but by the more limited scheme set forth in Section 105." 5 N.R.C. at 1317.

A.

Before turning to these arguments, we find it useful to review the history of the statutory provisions at issue here. Prior to 1970, section 105 vested the Commission with three areas of antitrust authority. Atomic Energy Act, ch. 1073, § 105, 68 Stat. 938 (1954) (amended 1970). First, section 105(a), which specified that nothing in the Act preempted various sections of the Sherman, Clayton, and Federal Trade Commission Acts, provided that "[i]n the event a licensee is found by a court . . . to have violated any of the provisions of such laws in the conduct of licensed activity, the Commission may suspend, revoke, or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this Act." Second, section 105(b) required the Commission to report to the Attorney General "any information it may have with respect to any utilization of special nuclear material or atomic energy which appears to violate or to tend toward the violation of [the antitrust provisions mentioned in section 105(a)], or to restrict free competition in private enterprise." Third, section 105(c) created a procedure governing the issuance of section 103 licenses under which (1) the Commission, if it proposed to issue such a license, was required to notify the Attorney General of the proposed license and the terms and conditions thereof, (2) the Attorney General then was required, within a reasonable time, to "advise the Commission whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws," and (3) "such advice [was to] be published in the Federal Register."

The pre-1970 Act also included a provision, section 186(a), which outlined the grounds that would warrant the Commission to revoke a license. That provision, which has not been amended since its enactment in 1954, states that:

> *Any license may be revoked* for any material false statement in the application or any statement of fact required [under section 182], or *because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application*, or for failure to construct or operate a facility in accordance with the terms of the construction permit or license or the technical specifications in the application, or for violation of, or failure to observe any of the terms and provisions of this chapter or of any regulation of the Commission.

Atomic Energy Act § 186(a), 42 U.S.C. § 2236(a) (1976) (emphasis added).

In *Cities of Statesville v. Atomic Energy Commission*, 441 F.2d 962 (D.C. Cir. 1969), this court, sitting en banc, discussed at some length the scope of the Commission's antitrust responsibilities under the licensing and antitrust review provisions in effect prior to 1970. The apparent conflict in *Statesville* was the fact that the Commission, without regard to antitrust considerations, had issued construction permits under section 104(b) for several nuclear power plants. In issuing those permits, the Commission had rejected petitioners' contentions (1) that the permits should have been issued under section 103, rather than under section 104(b), and (2) that even if section 104(b) were applicable, the Commission nonetheless should have reviewed the applications for possible antitrust violations. At oral argument before this court, it became apparent, however, that petitioners were "not really opposed to the construction of the plants, but [were] apprehensive about the possible impact of the [then existing] ownership arrangements upon the future availability of power to themselves as customers." *Id.* at 979 (McGowan, J., concurring). There is, therefore, some uncertainty re-

garding the nature of the controversy presented in *Statesville*.

It nonetheless is clear that the court in *Statesville* addressed two issues relevant here. First, the court, in Judge Tamm's majority opinion, affirmed the Commission's decision to proceed under section 104(b) on the ground that there had not been an adequate demonstration of the practical value of such facilities for industrial or commercial purposes. 441 F.2d at 969-72. But, as Judge Leventhal noted in his concurring opinion joined by Judges Wright and Robinson, "[t]he key ruling of the court endorsed by all its members" was not the court's holding that the construction permits were properly issued under section 104(b), but rather "that in the event of an intervening conclusion of the existence of practical value, the statute require[d] that that operating license[s] be issued under § 103." *Id.* at 984. Thus, the court plainly contemplated that, in the event of an intervening finding of "practical value," a licensee would be required to obtain a section 103 operating license (subject to prelicensing antitrust review under section 105(c)) for a facility that had been built pursuant to a section 104(b) construction permit (exempt, according to the *Statesville* majority, from any prelicensing antitrust review).

Second, in light of the plain language and legislative history of section 105 as well as the overall structure of the Act, Judge Tamm concluded that the Commission, in issuing construction permits or operating licenses under section 104(b), was not permitted to consider antitrust matters. *Id.* at 972-76. But the nuclear facilities at issue in *Statesville* were not, in Judge Tamm's view, completely immune from Commission antitrust review. In addition to the possibility that the operating licenses for these facilities might be issued under section 103

(and therefore be subject to antitrust scrutiny under section 105(c)), Judge Tamm observed:

> Finally, under section 186(a), . . . , the Commission has the power to revoke any type of license it has issued when there is a "violation of, or failure to observe any of the terms and provisions" of the Act. This section invests the Commission with a continuing "police" power over the activity of its licensees and provides it with the ability to take remedial action if a license is being used to restrain trade.

Id. at 974.[6]

In 1970, one year after the *Statesville* decision, Congress amended the provisions of the Act governing the licensing and antitrust review of nuclear facilities. The 1970 amendments were, in effect, a congressional finding of "practical value," requiring the Commission thereafter to issue "commercial" licenses under section 103, rather than "research and development" licenses under section 104(b). Atomic Energy Act § 102(a), 42 U.S.C. § 2132(a) (1976). The amendments, however, contained a grandfather clause governing nuclear facilities licensed for construction under section 104(b) at the time the

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[6] In his concurring opinion, Judge Leventhal characterized as dicta the majority's conclusion that the Commission lacked authority to consider "affirmative anticipatory antitrust sanctions" in issuing construction permits and operating licenses under section 104(b). This was dicta, in his view, because petitioners' real concern was to obtain antitrust review of the operating licenses, not the construction permits, for the nuclear facilities in question, and the operating licenses might well issue under section 103. Moreover, in response to the majority's "hypothetical appraisal of how the situation might stand if the operating licenses were issued under § 104," Judge Leventhal saw "no sound basis for an intimation that the Commission is absolutely prohibited from taking antitrust considerations into account in fashioning reasonable terms and conditions for an operating license under § 104." 441 F.2d at 986.

amendments were enacted. Those facilities were to be licensed for operation under their prior status as section 104(b) facilities, thereby remaining (with a limited exception not applicable here)[7] exempt from prelicensing antitrust review under section 105(c). *Id.* § 102(b), 42 U.S.C. 2132(b). Thus, Congress rejected the suggestion in *Statesville* that, in the event of a finding of "practical value," a licensee, having received a construction permit under section 104(b), would be required to obtain a section 103 operating license for the facility in question.

The Act as amended, and now currently in effect, carries forward the three basic areas of antitrust authority provided for prior to 1970. First, section 105(a), which was not amended, authorizes the Commission to suspend or revoke a license if the licensee is found by a court to have violated the antitrust laws in the course of licensed activity. Second, section 105(b), also not amended, requires the Commission to report to the Attorney General any information with respect to the utilization of atomic energy indicating a possible violation of the antitrust laws.

Third, section 105(c), which was amended, requires the Commission, when reviewing an application for a construction permit under section 103, to solicit the Attorney General's advice on antitrust matters, *id.* § 105(c)(1), 42

[7] This exception created a special class of section 104(b) operating licenses, which unlike other such licenses, were subject to prelicensing antitrust review under section 105(c). Such review of applications for section 104(b) operating licenses was authorized in cases where the party requesting antitrust review had raised the issue during the construction permit proceedings and renewed the request in writing within a specified time period. Atomic Energy Act § 105(c)(3), 42 U.S.C. § 2135(c)(3) (1976). The exception is not applicable here, because, as indicated above, Florida Cities did not seek antitrust review at the construction permit stage, nor for that matter, at the operating license stage.

U.S.C. § 2135(c)(1), to publish such advice in the *Federal Register*, *id.* § 105(c)(5), 42 U.S.C. § 2135(c)(5), and to permit the Attorney General, where he advises "that there may be adverse antitrust aspects and recommends that there be a hearing," to participate as a party in any licensing proceedings with regard to antitrust matters, *id.* The Commission, however, retains final authority in licensing matters:

> (5) . . . The Commission shall give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceedings in connection with such subject matter, and shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in [section 105(a)].
>
> (6) In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate.

Id. § 105(c)(5), (6), 42 U.S.C. § 2135(c)(5), (6).

With regard to an application for an operating license under section 103, the antitrust review procedures under section 105(c) are not applicable unless the Commission makes the threshold determination that "such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney Gen-

eral and the Commission . . . in connection with the construction permit for the facility." *Id.* § 105(c)(2), 42 U.S.C. § 2135(c)(2). No such antitrust review is permitted for an application for an operating license under section 104(b) unless the person seeking such review requested antitrust review at the construction permit stage and renewed the request in writing within a specified time period. *Id.* § 105(c)(3), 42 U.S.C. § 2135(c)(3).

In addition, section 186(a), which was not amended in 1970, authorizes the Commission to revoke "[a]ny license . . . because of conditions revealed . . . which would warrant the Commission to refuse to grant a license on an original application."

B.

It is also necessary, before turning to the merits, to say a brief word about this court's scope of review in the instant case. The issues presented here—(1) whether section 186(a) vests the Commission with antitrust authority over operating licenses other than that provided in section 105, and (2) if so, whether section 186(a) authorizes antitrust review of the section 104(b) operating licenses at issue here—both turn on matters of statutory interpretation. In this regard, we are cognizant of the general rule that "[t]he construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.'" *SEC v. Sloan*, 436 U.S. 103, 118 (1978) (quoting *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968)); *accord*, *Udall v. Tallman*, 390 U.S. 1, 16 (1965).

To accord this deference, however, is not to abdicate our own duty to construe the statute for we are also mindful that "the courts are the final authorities on issues of statutory construction, . . ., and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory

mandate or that frustrate the congressional policy underlying a statute.'" *SEC v. Sloan*, *supra*, 436 U.S. at 118 (quoting *Volkswagenwerk v. FMC*, *supra*, 390 U.S. at 272). In the instant case, where an agency is seeking to limit its own authority in an area not within its primary realm of responsibility, we must be especially vigilant to ensure that the agency is not shirking its statutory obligations.[8]

III

Turning now to the merits, we examine first the question whether section 186(a), even assuming that it vests the Commission with antitrust authority over operating licenses other than than provided in section 105, authorizes postlicensing antitrust review of the section 104(b) licenses at issue here. In the proceedings below, the Appeal Board analyzed this question in terms of the "conditions revealed" clause of section 186(a), under which "[a]ny license may be revoked . . . because of conditions revealed . . . which would warrant the Commission to refuse to grant a license on an original application." It was the view of the Appeal Board that:

> Even if we assume *arguendo* that section 186a means what Florida Cities assert it does, their cause is not advanced. The nuclear power plants in question were licensed under section 104b. As we have already explained, by Congressional mandate antitrust considerations were not grounds for refusing operating licenses to such "research and development" facilities.

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[8] This vigilance is evident, for example, in environmental cases involving government agencies whose primary mandates run counter to environmental concerns. *E.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1970); *see* Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974).

J.A. 380.[9] In light of this observation, the Commission, supported by FP&L, now urges this court to conclude that section 186(a), even if applicable to antitrust matters as a general rule, is not applicable in the instant case insofar as the Commission "was never 'warrant[ed] . . . to refuse to grant a license on an original application' to these facilities on the basis of findings directed to the competitive impact of licensing."

Florida Cities advance three arguments in reply. First, they assert that the Commission and FP&L have urged us to read the "conditions revealed" clause of section 186(a) in a manner inconsistent with the fact that it is written in the present conditional tense ("would warrant"), rather than the past conditional tense ("would [have] warrant[ed]"). It is Florida Cities' view that, because "section 186(a) is written in the subjunctive, applying *present* facts to the hypothetical 'original' license application," FP&L's operating plants must be treated as what they really are—viable commercial generating facilities that could be licensed today only under section 103. Treating these plants as section 103 facilities for the purposes of the "conditions revealed" clause, so the argument goes, would mean that antitrust review is authorized here insofar as Florida Cities' allegations of antitrust violations, if proven, "would warrant the Commission to refuse to grant a license on an original [section 103] application." In sum, Florida Cities advance an interpretation of the "conditions revealed" clause, under which section 104(b) licenses, which were exempt altogether from prelicensing antitrust review, would be subject to postlicensing antitrust review under the standards governing antitrust review of applications for section 103 licenses.

[9] In his letter rejecting Florida Cities' request for antitrust review, the Director of Nuclear Reactor Regulation based his decision on "the reasons there stated," referring to the reasons stated in the Appeal Board's opinion. J.A. 398.

Neither side, in our view, has advanced a satisfactory interpretation of the "conditions revealed" clause of section 186(a). The Commission and FP&L have invited us, as Florida Cities assert, to ignore the fact that the clause is written in the present conditional tense ("would warrant") and to interpret it instead as providing for the revocation of "[a]ny license . . . because of conditions revealed . . . which would [have] warrant[ed] the Commission to refuse to grant a license on an original application." We reject this invitation. It is significant, we think, that the "conditions revealed" clause applies to all licensing matters, including health, safety, and environmental considerations. Congress, when it enacted section 186(a) in 1954, must have envisioned that licensing standards, especially in the areas of health and safety regulation, would vary over time as more was learned about the hazards of generating nuclear energy. Insofar as those standards became more demanding, Congress surely would have wanted the new standards, if the Commission deemed it appropriate, to apply to those nuclear facilities already licensed.[10] *Cf.* Atomic Energy Act § 187, 42 U.S.C. § 2237 (1976). It is our view, therefore, that the use of the present conditional tense ("would warrant"), rather than the past conditional tense ("would

[10] By way of example, we believe that this clause of section 186(a) was designed to deal with a situation where, let us say, the Commission, after issuing a construction permit or operating license, determined that more demanding licensing standards than those applicable when the permit or license was issued were necessary to accord adequate protection to the health of workers in nuclear plants. It is our view that Congress worded section 186(a) so as to permit the Commission to revoke the previously-issued permit or license if conditions revealed that the licensee did not meet the revised safety standards.

[have] warrant[ed]"), reflects a deliberate policy choice on the part of Congress when it enacted section 186(a) to render licenses for nuclear facilities subject to postlicensing review under evolving licensing standards, rather than under those standards applicable at the time the license in question was issued. Accordingly, we reject the Commission's interpretation of the "conditions revealed" clause.

Florida Cities urge us to interpret section 186(a) in a manner such that, for the purposes of license revocation under the "conditions revealed" clause, section 104(b) licenses would be treated as section 103 licenses. Section 186(a) provides, in relevant part, that "[a]ny license may be revoked . . . because of conditions revealed . . . which would warrant the Commission to refuse to grant a license on an original application." It is Florida Cities' position that, because section 186(a) is written in the present conditional tense, the term "original application" must refer to an original application not for the type of license being revoked, but rather for the type of license currently being issued for nuclear facilities similar to the facility in question.

We reject this interpretation as well. A more plausible reading of the "conditions revealed" clause, in our view, is that the term "original application" refers to an original application for the type of license being revoked. The significance we attach to the fact that section 186(a) is written in the present conditional tense is not that Congress intended to render licenses for nuclear facilities subject to postlicensing review under licensing standards for the type of license currently being issued for nuclear facilities similar to the facility in question, but rather that Congress intended to render licenses for nuclear facilities subject to postlicensing review under licensing standards currently applicable to the type of license in question.

This conclusion, we think, finds support in the legislative history of the 1970 amendments. Those amendments, though abolishing the requirement that the Commission make a finding of "practical value" before issuing section 103 licenses (which, unlike section 104(b) licenses, were subject to prelicensing antitrust review under section 105(c)), included a grandfather clause governing nuclear facilities, such as those at issue here, that had already been licensed for construction under section 104(b), but had not as yet been licensed for operation. Pursuant to the grandfather clause, the Act, as amended, permitted licensees holding construction licenses issued under section 104(b) at the time the amendments were enacted to obtain operating licenses under section 104(b) as well, thereby retaining their exemption (with a limited exception not applicable here) from prelicensing antitrust review under section 105(c). *See* part II.A *supra*. Rejecting this court's "key ruling" in *Statesville* "that in the event of an intervening [finding] of practical value, the statute requires that [an] operating license be issued under section 103," [11] the Joint Committee on Atomic Energy concluded:

> [I]t would impose an unnecessary hardship on subsection 104b. licensees to compel them to convert their permits to section 103 licenses; the matter of potential antitrust review of certain subsection 104 licenses is specifically dealt with in section [105c(3)], and is discussed below, and it appears to the committee that no useful purpose could be served by compelling any conversion to section 103.[12]

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[11] Cities of Statesville v. Atomic Energy Commission, *supra*, 441 F.2d at 984 (Leventhal, J., concurring).

[12] Section 105(c)(3) provides for prelicensing antitrust review of section 104(b) operating licenses in cases where the party requesting antitrust review raised the issue during the construction permit proceedings and renewed the request in writing within a specified time period. *See* note 7 *supra*.

H.R. REP. NO. 1470, 91st Cong., 2d Sess. 26-27 (1970). This statement is consistent with tone of the hearings leading to the enactment of the 1970 amendments, where, for example, Representative Hosmer observed:

> With all the other woes suffered by these people who have followed the inducement of the Atomic Energy Commission to build plants to demonstrate the practical value of nuclear energy, I am wondering why, in good discretion, they ought not be left to proceed on the same basis they started as a matter of fairness, equity, and any of the other virtues that you might surmise.

Prelicensing Antitrust Review of Nuclear Powerplants: Hearings Before the Joint Comm. on Atomic Energy, 91st Cong., 1st & 2d Sess. 40 (1969-1970).

The legislative history of the grandfather clause suggests to us that Congress, by creating an exemption from the general requirement of prelicensing antitrust review, deliberately chose to single out section 104(b) licensees, such as FP&L, for special treatment in obtaining operating licenses. Inasmuch as the "conditions revealed" clause of section 186(a) is framed specifically in terms of the standards governing original license applications, we think it would be anomalous to interpret section 186(a) as authorizing postlicensing antitrust review under section 103 standards of the section 104(b) licenses at issue here, which, when reviewed as original license applications, were accorded by congressional mandate a special exemption from antitrust review. Accordingly, we reject Florida Cities' interpretation of the "conditions revealed" clause under which, for the purposes of license revocation, section 104(b) licenses would be treated as section 103 licenses.

It is our view instead that the "conditions revealed" clause is a grant of authority to revoke a license where conditions are revealed that would warrant the Com-

mission, under current licensing standards for the type of license in question, to refuse to grant a license on an original application. Accordingly, inasmuch as antitrust considerations, under the licensing standards currently applicable to the type of license at issue here,[13] are not grounds that would warrant the Commission to refuse to grant a license on an original application,[14] we con-

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[13] The licensing standards currently applicable to the type of license at issue here are those standards now governing the issuance of operating licenses under section 104(b). In this regard, we note that section 104(b) provides for the issuance of licenses not only for facilities licensed for construction under section 104(b) before the 1970 amendments were enacted, but also for facilities "for industrial or commercial purposes constructed or operated under an arrangement with the Commission entered into under the Cooperative Power Reactor Demonstration Program." Atomic Energy Act § 102(b), (c), 42 U.S.C. § 2132(b), (c) (1976). Accordingly, even after the Commission has issued operating licenses to all those section 104(b) facilities grandfathered in 1970, there will still be "currently applicable" licensing standards for section 104 operating licenses, namely, those standards governing the issuance of such licenses under the Cooperative Power Reactor Demonstration Program.

[14] The section 104(b) operating licenses at issue here are exempt from prelicensing antitrust review under section 105(c), the only provision in the Act that expressly provides for such review. *See* Atomic Energy Act § 105(c)(3), 42 U.S.C. § 2135(c)(3) (1976). It is Florida Cities' view, however, that even if section 105(c) exempts these licenses from prelicensing antitrust review, the Commission is authorized to conduct such review directly under section 104(b), which provides:

> As provided for in [subsection 102(b) or 102(c)], or where specifically authorized by law, the Commission is authorized to issue licenses under this subsection to persons applying therefor for utilization and production facilities for industrial and commercial purposes. In issuing licenses under this subsection, the Commission shall impose the minimum amount of such regulations and terms of license *as will permit the Com-*

clude that, under our reading of the "conditions revealed" clause, Florida Cities are not entitled to post-licensing antitrust review of FP&L's operating licenses.

The second argument advanced by Florida Cities in support of their view that antitrust review is authorized in the instant case focuses on a clause of section 186(a) the Appeal Board never discussed, namely, the clause authorizing the Commission to revoke a license in cases involving a "violation of, or failure to observe any of the terms and provisions of this chapter. . . ." This clause, according to Florida Cities, authorizes antitrust review here because (1) the phrase "terms and provisions of this chapter" in section 186(a) refers to, among other things, "the continuing obligation of all licensees to com-

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mission to fulfill its obligations under this chapter. (emphasis added).

Id. § 104(b), 42 U.S.C. § 2134(b).

The short answer to this argument, in addition to the fact that it was rejected in *Statesville*, 441 F.2d at 974-75, is that the Commission has no "obligations under this chapter" with regard to prelicensing antitrust review other than those provided in section 105(c). Moreover, with regard to prelicensing antitrust review of section 104(b) licenses under the 1970 amendments, the Joint Committee on Atomic Energy observed that:

> [I]t would impose an unnecessary hardship on subsection 104b. licensees to compel them to convert their permits to section 103 licenses; *the matter of potential antitrust review of certain subsection 104 licenses is specifically dealt with in section [105c(3)]*, and is discussed below, and it appears to the committee that no useful purpose could be served by compelling any conversion to section 103.

H.R.REP. No. 1470, 91st Cong., 2d Sess. 26-27 (1970) (emphasis added). It is our view, therefore, that section 105(c), which exempts the operating licenses at issue here, is the Commission's exclusive grant of prelicensing antitrust authority over section 104(b) operating licenses.

port with the antitrust laws under section 105(a)," and (2) FP&L has failed to observe this continuing obligation by violating the antitrust laws in the course of licensed activity.

This argument, we think, falls short of the mark. Section 105 provides:

> Nothing contained in this chapter shall relieve any person from the operation of sections 1 to 13, 14 to 19, 20, 21, 22 to 27, 41 to 46, and 47 to 58 of Title 15 and sections 52 and 53 of Title 29. .In the event a licensee is found by a court of competent jurisdiction, either in an original action in that court or in a proceeding to enforce or review the findings or orders of any Government agency having jurisdiction under the sections cited above, to have violated any of the provisions of such sections in the conduct of the licensed activity, the Commission may suspend, revoke, or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this chapter.

It is our view that the first quoted sentence, rather than creating—as Florida Cities suggest—an independent obligation on the part of licenses to comport with the antitrust laws, simply provides that those laws are not preempted by the Act. To say that the antitrust laws listed in the savings clause of section 105(a) are "terms and provisions of this chapter" within the meaning of section 186(a) is to strain to an excessive degree the language of both statutory provisions.

It is particularly inappropriate to equate the antitrust laws with "terms and provisions of this chapter," in light of fact that interpreting section 186(a) as authorizing the Commission to revoke a license when a licensee has violated the antitrust laws would render superfluous the second sentence of section 105(a), which authorizes the Commission to revoke a license when a court finds

that a licensee has violated the antitrust laws. The rules of statutory construction militate against such an interpretation. It is our view, therefore, that, under either clause of section 186(a) cited by Florida Cities, the Commission, whether acting through its licensing boards or the Director of Nuclear Reactor Regulation, is without authority to conduct postlicensing antitrust review of the section 104(b) operating licenses at issue here.[15]

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[15] This conclusion is not, we think, inconsistent with the observation in *Statesville* that:

> Finally, under section 186(a), . . ., the Commission has the power to revoke any type of license it has issued when there is a "violation of, or failure to observe any of the terms and provisions" of the Act. This section invests the Commission with a continuing "police" power over the activity of its licensees and provides it with the ability to take remedial action if a license is being used to restrain trade.

441 F.2d at 974. The court in *Statesville* made reference to section 186(a) only to demonstrate that, under the pre-1970 Act, its conclusion that the Commission was not authorized to consider antitrust matters in issuing construction permits for the "research and development" facilities there involved would "not preclude the Commission from keeping an administrative eye on anticompetitive effects of the use of these facilities once they are constructed." *Id.* at 973. Moreover, in the sentence immediately preceding its discussion of section 186(a) quoted above, the *Statesville* court strongly suggested that the facilities there at issue, though licensed for construction under section 104(b), would have to be licensed for operation under section 103.

With regard to section 103 operating licenses and those section 104(b) operating licenses subject to prelicensing antitrust review, we do not foreclose the possibility that the Commission has postlicensing antitrust authority under section 186(a). In fact, we expressly reserve judgment on that question. *See* note 17 *infra*. We hold here only that if the Commission has such authority its source is not, as *Statesville* suggested, the clause of section 186(a) permitting license

Florida Cities' third, and final, argument is that, even assuming the Commission is correct in suggesting that section 186(a) is, by its own terms, inapplicable to the licenses at issue here, we cannot affirm the Commission on this point because the decisions under review rested solely on another ground, namely, that section 105 is the Commission's exclusive grant of antitrust authority in licensing nuclear facilities. In this regard, Florida Cities note that the Appeal Board, after explaining why

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revocation "for violation of, or failure to observe any of the terms and provisions of this chapter," *see* pages 24-36 *supra*, but rather the clause permitting license revocation "because of conditions revealed . . . which would warrant the Commission to refuse to grant a license on an original application," *see* pages 20-24 *supra*. This is not, we think, a significant departure from *Statesville* inasmuch as the court there cited section 186(a) for the proposition that the provision vested the Commission with postlicensing antitrust authority over the licenses there involved, not for the proposition that the source of this authority was the clause of section 186(a) providing for license revocation where a licensee has violated the "terms and provisions of this chapter."

That facilities, such as those at issue here, would be licensed for operation under section 104(b) even though Congress had abolished the required finding of "practical value" was not, and could not have been, within the contemplation of the court in *Statesville*. In fact, the *Statesville* decision was premised on precisely the opposite view, namely, that the statute required that, in the event of an intervening finding of practical value, facilities licensed for construction under section 104(b) would have to be licensed for operation under section 103. It is our view, therefore, that, inasmuch as the instant case involves a class of licenses accorded a unique antitrust status after *Statesville* was decided, we cannot regard as controlling here the broad observation made there that section 186(a) vests the Commission with postlicensing antitrust jurisdiction over "any type of license." Our analysis in the instant case reveals, to the contrary, that Congress did not intend to vest the Commission with such authority over the operating licenses at issue here.

it thought that the licenses at issue here did not fall within the ambit of section 186(a), concluded:

> But even accepting everything [Florida Cities] say, no construction of section 186 need be made here. As we explain in Part III [which presented the argument that section 105 is the Commission's exclusive grant of antitrust authority], other grounds compel rejection of their contentions.

J.A. 380. This passage, in Florida Cities' view, reveals that the Appeal Board and the Director of Nuclear Reactor Regulation (who based his decision on the reasons stated in the Appeal Board's opinion) suggested, but did not rely, on the ground that section 186(a), by its own terms, does not authorize postlicensing antitrust review in the instant case. The Commission's reliance here upon a ground suggested, but not relied on, in the decisions below is, so the argument goes, a *post hoc* rationalization that we may not accept as a proper basis for affirming the decisions under review.

We have no quarrel with the legal principles underlying this argument. It is well settled that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). In *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), the Supreme Court summarized a "simple but fundamental" rule of administrative law:

> That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

This rule seeks "not to deprecate, but to vindicate . . ., the administrative process, for the purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'" *Burlington Truck Lines, Inc. v. United States*, *supra*, 371 U.S. at 169 (quoting *SEC v. Chenery Corp.*, *supra*, 332 U.S. at 196).

Our reading of the record, however, differs from that of Florida Cities. The theory that section 186(a) does not, by its own terms, authorize postlicensing antitrust review of the licenses at issue here was, we think, not dicta, but rather an alternative ground for the Appeal Board's decision. The Appeal Board's conclusion that "no construction of section 186 need be made here [because] . . . other grounds compel rejection of [Florida Cities'] contentions" was meant to indicate that there existed an alternative ground for decision, not that the Appeal Board was relying exclusively on that alternative ground.[16] Although the concluding passage quoted above could have been written more precisely, we are guided by the Supreme Court's observation:

> While we may not supply a reasoned basis for the agency's action that the agency itself has not given, . . . , we will uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned.

Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974) (citations omitted). We conclude, therefore, that the *Chenery* doctrine

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[16] It is significant, we think, that the passage quoted above served not only as the conclusion to the discussion regarding whether section 186(a), by its own terms, authorizes postlicensing antitrust review of the licenses at issue here, but also as a transition to the discussion regarding whether section 105 is the Commission's exclusive grant of antitrust authority in licensing nuclear facilities.

is inapposite here inasmuch as the Appeal Board's decision included as an alternative ground for decision, rather than as dicta, the theory that even assuming that section 186(a) vests the Commission with antitrust authority over operating licenses other than that provided in section 105, it does not, by its own terms, authorize postlicensing antitrust review of the licenses at issue here. It is on this alternative ground for decision, and this ground alone, that we affirm the decisions under review.[17]

IV

In summary, we hold that even assuming that section 186(a) vests the Commission with antitrust authority over operating licenses other than that provided in section 105, it does not, by its own terms, authorize postlicensing antitrust review of the section 104(b) operating licenses at issue here. This decision turns on our view that section 186(a) is not a plenary grant of authority to revoke a license, but rather a limited grant of such authority applicable only where conditions are revealed that would warrant the Commission, under current licensing standards for the type of license in question, to refuse to grant a license on an original application. In the instant case, involving section 104(b) operating licenses which are exempt under current licensing standards from prelicensing antitrust review, Florida Cities are not entitled to postlicensing antitrust review under section 186(a) inasmuch as their allegations of antitrust violations, even if true, would not warrant the Commission to refuse to grant a license on an original application.

To so immunize the licenses at issue here from postlicensing antitrust review under section 186(a) is not,

[17] We need not, and do not, reach the question whether section 105 is the Commission's exclusive grant of antitrust authority over operating licenses for nuclear facilities.

as Florida Cities assert, to give FP&L a "carte blanche to use [its] facilities directly contrary to the antitrust laws." Section 105(a) not only provides that nothing in Act preempts the normal operation of the antitrust laws, but also vests the Commission with authority to revoke or modify FP&L's operating licenses in the event that a court finds that FP&L has violated those laws in the course of licensed activity. Moreover, the Commission, acting pursuant to section 105(b), has already forwarded Florida Cities' antitrust allegations to the Justice Department. Accordingly, we affirm the decisions under review.

It is so ordered.

APPENDIX

Section 102 of the Atomic Energy Act, 42 U.S.C. § 2132 (1976), provides:

> (a) Except as provided in subsections (b) and (c) of this section, or otherwise specifically authorized by law, any license hereafter issued for a utilization or production facility for industrial or commercial purposes shall be issued pursuant to section 2133 of this title.
>
> (b) Any license hereafter issued for a utilization or production facility for industrial or commercial purposes, the construction or operation of which was licensed pursuant to section 2134(b) of this title prior to enactment into law of this subsection, shall be issued under section 2134(b) of this title.
>
> (c) Any license for a utilization or production facility for industrial or commercial purposes constructed or operated under an arrangement with the Commission entered into under the Cooperative Power Reactor Demonstration Program shall, except as otherwise specifically required by applicable law, be issued under section 2134(b) of this title.

Section 103 of the Atomic Energy Act, 42 U.S.C. § 2133 (1976), provides in relevant part:

> (a) The Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export under the terms of an agreement for cooperation arranged pursuant to section 2153 of this title, utilization or production facilities for industrial or commercial purposes. Such licenses shall be issued in accordance with the provisions of subchapter XV of this chapter and subject to such conditions as the

> Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter.
>
> (b) The Commission shall issue such licenses on a nonexclusive basis to persons applying therefor (1) whose proposed activities will serve a useful purpose proportionate to the quantities of special nuclear material or source material to be utilized; (2) who are equipped to observe and who agree to observe such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish; and (3) who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public. All such information may be used by the Commission only for the purposes of the common defense and security and to protect the health and safety of the public.

Section 104 of the Atomic Energy Act, 42 U.S.C. § 2134 (1976), provides in relevant part:

> (b) As provided for in subsection (b) or (c) of section 2132 of this title, or where specifically authorized by law, the Commission is authorized to issue licenses under this subsection to persons applying therefor for utilization and production facilities for industrial and commercial purposes. In issuing licenses under this subsection, the Commission shall impose the minimum amount of such regulations and terms of license as will permit the Commission to fulfill its obligations under this chapter.

Section 105 of the Atomic Energy Act, 42 U.S.C. § 2135 (1976), provides in relevant part:

(a) Nothing contained in this chapter shall relieve any person from the operation of sections 1 to 13, 14 to 19, 20, 21, 22 to 27, 41 to 46, and 47 to 58 of Title 15 and sections 52 and 53 of Title 29. In the event a licensee is found by a court of competent jurisdiction, either in an original action in that court or in a proceeding to enforce or review the findings or orders of any Government agency having jurisdiction under the sections cited above, to have violated any of the provisions of such sections in the conduct of the licensed activity, the Commission may suspend, revoke, or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this chapter.

(b) The Commission shall report promptly to the Attorney General any information it may have with respect to any utilization of special nuclear material or atomic energy which appears to violate or to tend toward the violation of any of the foregoing sections, or to restrict free competition in private enterprise.

(c) (1) The Commission shall promptly transmit to the Attorney General a copy of any license application provided for in paragraph (2) of this subsection, and a copy of any written request provided for in paragraph (3) of this subsection; and the Attorney General shall, within a reasonable time, but in no event to exceed 180 days after receiving a copy of such application or written request, render such advice to the Commission as he determines to be appropriate in regard to the finding to be made by the Commission pursuant to paragraph (5) of this subsection. Such advice shall include an explanatory statement as to the reasons or basis therefor.

(2) Paragraph (1) of this subsection shall apply to an application for a license to construct or operate a utilization or production facility under section

2133 of this title: *Provided, however,* That paragraph (1) shall not apply to an application for a license to operate a utilization or production facility for which a construction permit was issued under section 2133 of this title unless the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility.

(3) With respect to any Commission permit for the construction of a utilization or production facility issued pursuant to subsection (b) of section 2134 of this title prior to December 19, 1970, any person who intervened or who sought by timely written notice to the Commission to intervene in the construction permit proceeding for the facility to obtain a determination of antitrust considerations or to advance a jurisdictional basis for such determination shall have the right, upon a written request to the Commission, to obtain an antitrust review under this section of the application for an operating license. Such written request shall be made within 25 days after the date of initial Commission publication in the Federal Register of notice of the filing of an application for an operating license for the facility or December 19, 1970, whichever is later.

. . . .

(5) Promptly upon receipt of the Attorney General's advice, the Commission shall publish the advice in the Federal Register. Where the Attorney General advises that there may be adverse antitrust aspects and recommends that there be a hearing, the Attorney General or his designee may participate as a party in the proceedings thereafter held by the Commission on such licensing matter in connection

with the subject matter of his advice. The Commission shall give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceedings in connection with such subject matter, and shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection (a) of this section.

(6) In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate.

Section 186 of the Atomic Energy Act, 42 U.S.C. § 2236 (1976), provides in relevant part:

(a) Any license may be revoked for any material false statement in the application or any statement of fact required under section 2232 of this title, or because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application, or for failure to construct or operate a facility in accordance with the terms of the construction permit or license or the technical specifications in the application, or for violation of, or failure to observe any of the terms and provisions of this chapter or of any regulation of the Commission.

APPENDIX B

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit
Washington, D.C. 20001

George A. Fisher, Clerk

March 23, 1979

RE: Appeal No. 77-1925 & No. 77-2101
Ft. Pierce Utilities Authority of the City of Ft. Pierce, et al.

v.

U.S.A. & Nuclear Regulatory Commission

Dear Sir:

Enclosed herewith are three (3) copies of the opinion in the above entitled case.

Please note that the judgment has been entered on the same date as the opinion and is for mandate purposes only.

Very truly yours,

Joyce E. Trimboli
Opinions Clerk

Enclosure

DISTRIBUTION:

Robert A. Jablon, Esq.
John J. Powers, III, Esq.
Stephen F. Eilperin, Esq.
J. A. Bouknight, Jr., Esq.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
Washington, D.C. 20555

September 9, 1977

Docket Nos. 50-335A, 50-250A, 50-251A

Robert A. Jablon, Esq.
Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

Dear Mr. Jablon:

Our letter of May 16, 1977 provided you with a notice filed with the Office of the Federal Register for publication concerning your petition for order to show cause against the Florida Power and Light Company dated April 18, 1977. Our May 16, 1977 letter stated that within a reasonable time you would be informed of our decision with respect to your request.

On August 23, 1977, the Atomic Safety and Licensing Appeal Board (ALBA-428) determined, among other things, that the Commission's jurisdiction for antitrust review terminates upon issuance of an operating license. For the reasons there stated, I find that it is not permissable for me to issue an order to show cause in connection with this matter.

Accordingly, your Petition for Order to Show Cause is denied.

Sincerely,

Edison G. Case
Acting Director
Office of Nuclear Reactor
Regulation

CC: Florida Power & Light Co.
J.A. Bouknight, Jr., Esq.

Cite as 6 NRC 221 (1977) ALAB-428

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Richard S. Salzman
Jerome E. Sharfman

In the Matter of

FLORIDA POWER AND LIGHT COMPANY
(St. Lucie Plant, Unit No. 1) — **Docket No. 50-335A**

FLORIDA POWER AND LIGHT COMPANY
(Turkey Point Plant, Units No. 3 and 4) — **Docket Nos. 50-250A, 50-251A**

August 23, 1977

The Appeal Board affirms a Licensing Board order (LBP-77-23, 5 NRC 789) denying a joint petition for leave to intervene out of time and for an antitrust hearing concerning three fully licensed plants. It further issues a declaratory order that the Director of Nuclear Reactor Regulation has no authority to initiate an antitrust review on the basis of the instant petition.

ATOMIC ENERGY ACT: ANTITRUST REVIEW

The antitrust responsibilities of both the Licensing Board and the Director of Nuclear Reactor Regulation end (with certain limited exceptions) with the termination of operating license proceedings.

ATOMIC ENERGY ACT: ANTITRUST REVIEW

Congress elected to exclude from Section 105c antitrust review (with limited exceptions) reactors authorized prior to the 1970 antitrust amendments to be built (pursuant to Section 104b) as research and development projects, although such reactors might be determined to have commercial value when operating licenses were later sought.

ATOMIC ENERGY ACT: ANTITRUST REVIEW

Section 186a does not require plants licensed as research and development facilities under Section 104b subsequently to be treated as commercial generating facilities subject to Section 103 requirements.

ATOMIC ENERGY ACT: ANTITRUST REVIEW

The general provisions of Section 186 are "subordinate to the specific, limited regime [of Section 105] adopted by Congress as recently as the 1970 amendments to the Act" with respect to the Commission's supervisory antitrust jurisdiction. *Houston Lighting and Power Co.* (South Texas Project), CLI-77-13, 5 NRC 1303 (June 15, 1977) (petition for judicial review pending).

Messrs. J. A. Bouknight, Jr., Washington, D. C., and **John E. Mathews, Jr.**, Jacksonville, Florida, argued the cause and filed a brief for the licensee, Florida Power and Light Company, *appellee*.

Mr. Alan J. Roth, Washington, D. C., argued the cause for the petitioners, Fort Pierce Utilities Authority, *et al., appellants;* with him on the briefs were **Messrs. Robert A. Jablon** and **David A. Giacalone,** Washington, D. C.

Mr. Benjamin H. Vogler argued the cause for the Nuclear Regulatory Commission staff; **Messrs. Lee Scott Dewey** and **Michael D. Jones** on the brief.

DECISION

Opinion of the Board by Mr. Salzman in which Mr. Rosenthal joins; Mr. Sharfman joins in part and concurs in the result:

I

A number of Florida municipal electric systems and the Florida Municipal Utilities Association (Florida Cities) appeal from a Licensing Board order denying their joint petition for leave to intervene out of time and for an antitrust hearing respecting three nuclear power plants.[1] The plants, owned by the Florida Power and Light Company and operated under Commission license, are Unit No. 1 of FP&L's St. Lucie facility and Units No. 3 and 4 of its Turkey Point facility. The denial was based on our ruling in another case that "a licensing board has not been bestowed with jurisdiction to direct a hearing on antitrust matters—by a grant of an intervention petition or otherwise—in the absence of a pending construction permit or operating license proceeding." *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-381, 5 NRC 582, 592 (1977).[2]

The Commission has allowed our ruling in ALAB-381 to stand (see unpublished Commission order of March 31, 1977, referred to in CLI-77-13, 5 NRC 1303, 1308 (June 15, 1977)),[3] and we decline Florida Cities' invitation to reconsider its correctness. Thus, all that the Florida Cities' appeal requires us to decide is whether the Licensing Board justifiably concluded that the ruling governs here. Given the fact the operating license proceedings for the three reactors were long ago concluded, the answer obviously must be in the affirmative. In these circumstances we ordinarily would have simply affirmed the Licensing Board summarily. A supervening development, however, has prompted us to examine a broader question not presented to, or decided by, the Board below.

Not content with the prosecution of an appeal to us from the denial of its intervention petition for want of *Licensing Board* jurisdiction to grant it, Florida Cities moved before the Commission for a "clarification of procedures." Interpreting that motion as seeking, *inter alia*, a declaratory order regarding "the most appropriate procedural mechanism for resolution of the Cities' antitrust allegations respecting the St. Lucie and Turkey Point reactors," the Commission determined that the issues raised by the motion should be first addressed by either us or the Director of Nuclear Reactor Regulation. CLI-77-15, 5 NRC 1324, 1326 (June 22, 1977). Upon the receipt of that referral and the briefs of the respective parties in the wake of it, we called for and heard oral argument on whether, even though the Licensing Board may lack the authority at this juncture to trigger a hearing to explore Florida Cities' antitrust grievances, such authority nevertheless resides in the Director of Nuclear Reactor Regulation. On a full consideration of the arguments put before us we hold that that power is lacking. Particularly in light of the Commission's own recent analysis of the statutory scheme, we are constrained to conclude that (with certain exceptions

[1] LBP-77-23, 5 NRC 789 (April 5, 1977). In the same order, the Licensing Board granted Florida Cities' request for like relief in connection with Unit No. 2 of the St. Lucie facility. We affirmed that action in ALAB-420, 6 NRC 8 (July 12, 1977) (petition for Commission review pending).

[2] Unlike the three operating reactors under present consideration, St. Lucie 2 was the subject of an on-going construction permit proceeding at the time the Licensing Board entered its April 5 order. For this reason the Licensing Board indisputably had the jurisdiction to grant an antitrust hearing with respect to that reactor.

[3] CLI-77-13 is discussed *infra*, pp. 226-227.

not applicable here) once the operating license proceedings terminated this agency's antitrust responsibilities relating to these reactors came to an end.[4]

II

The former Atomic Energy Commission licensed the construction of all three nuclear power reactors now before us not as commercial facilities subject to Section 103 but as "research and development" reactors under Section 104b of the Atomic Energy Act of 1954.[5] Construction permits for them were issued before Section 105c of the Act[6] (defining Commission antitrust procedure) was amended to its present form in 1970. At the time these permits were issued, prelicensing antitrust review by the Commission was neither required nor expected in the case of Section 104b projects. *Cities of Statesville* v. *AEC*, 441 F.2d 962 (D.C. Cir. 1969). This of course explains why none was undertaken for these three reactors.

Florida Cities seize upon these circumstances as a reason why this Commission ought to consider the antitrust charges they now level against the licensee of the plants. In their view, if antitrust review is refused, the Commission will have licensed what are in fact three large commercial power plants to operate for 40 years and, Florida Cities stress, the Commission will have done so without ever having given thought to the resulting anticompetitive ramifications.

Were this a matter of first impression, Florida Cities' arguments could not be brushed aside lightly. One need look no further than Judge Leventhal's concurring opinion in *Statesville, supra*, for an impressive collection of authorities for the proposition that (441 F.2d at 987):

> a statute providing for licensing or other regulation is presumed to permit consideration of antitrust principles, with the harmonizing approach just outlined, unless a contrary intent appears expressly or by necessary implication.[7]

[4] Also before us are motions by two of the Florida Cities, Quincy and Daytona Beach, for leave to withdraw. Quincy's motion is opposed by Florida Power and Light Company. Insofar as the motions are directed to the proceedings now before us—*i.e.*, respecting St. Lucie, Unit No. 1, and Turkey Point, Units 3 and 4—the motions are *dismissed as moot;* insofar as leave is sought to withdraw from proceedings involving two other FP&L facilities, St. Lucie, Unit No. 2, and the South Dade plants, these matters are not before us and the motions are therefore denied without prejudice to renewal before the appropriate Licensing Board.

[5] 42 U.S.C. §§ 2133, 2134(b).

[6] 42 U.S.C. § 2135(c).

[7] Neither the majority nor the dissenters in *Statesville* disagreed. See 441 F.2d at 974, and 993-95. And see *Kansas City Gas and Electric Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 568 (1975) and cases there cited.

Accord: *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747 759-61 (1973).

But this is not a new matter. The legislative history of Section 105c relevant to this point was previously perused by us in the *"Grandfather Clause"* case.[8] We there noted that the Congress had considered this class reactors—*viz.*, those authorized to be built as research and development projects before the 1970 antitrust amendments but which might later be determined to possess commercial utility when an operating license was sought for them—and elected to exclude them from antitrust review under Section 105c (except in limited circumstances not present in this case).[9]

Florida Cities' response is that antitrust review is nevertheless available before this Commission under Section 186a of the Act.[10] That section, pertaining to license revocations, provides in pertinent part that

> Any license may be revoked for any material false statement in the application or any statement of fact required under section 182, or because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application . . . .

Florida Cities reason that, because the Commission may refuse an operating license on antitrust grounds (at least where circumstances change following issuance of the construction permit), Section 186a empowers it to revoke a license previously granted on those grounds.

Even if we assume *arguendo* that Section 186a means what Florida Cities assert it does, their cause is not advanced. The nuclear power plants in question were licensed under Section 104b. As we have already explained, by Congressional mandate antitrust considerations were not grounds for refusing operating licenses to such "research and development" facilities.

Florida Cities would get over this second hurdle by having us give a "common sense" reading to Section 186a that requires us to treat these reactors as what they really are: viable commerical generating facilities that could only be licensed today under Section 103. There appears to be no support for this reading of the section in the legislative history of the Atomic Energy Act and petitioners cite none. Nor is the "meaning" which Florida Cities ascribe to Section 186a necessarility so "plain" as they suggest. But even accepting everything they say, no construction of Section 186 need be made here. As we explain in Part III, other grounds compel rejection of their contentions.

[8] *The Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Unit 1), ALAB-323, 3 NRC 331 (1976).

[9] See 3 NRC at 340-41.

[10] 42 U.S.C. § 2236(a).

In its own *South Texas* decision,[11] the Commission recently considered at length the extent of its authority to hold antitrust hearings. The precise issue in that case involved when an antitrust proceeding under Section 105c may be ordered after a construction permit has been issued but before the necessary additional license to commence operations has been granted. The Commission did not confine its *South Texas* opinion to that relatively narrow question; instead it chose to address the broad spectrum of NRC antitrust responsibilities. In so doing, it manifested the judgment in no uncertain terms that the NRC's supervisory antitrust jurisdiction over a nuclear reactor licensee does not extend over the full 40-year term of the operating license but ends at its inception.[12]

The Commission said

> that Congress had no intention of giving this Commission authority which could put utilities under a continuing risk of antitrust review. Had Congress agreed with the proposition that this Commission should have broad antitrust policing powers independent of licensing, the statute that emerged from these discussions would have looked quite different. Little attention would have been paid to defining a two-step review process. The terminology of all participants in the drafting process would not have been focused so directly on "prelicensing" review. And, if a broad, ongoing police power in the antitrust area had been assumed, the language in 105(a) authorizing the Commission to act with respect to licenses already issued, in light of the antitrust findings of courts would have been, if not superfluous, certainly redundant. *Consequently, we find that the Commission's antitrust authority is defined not by the broad powers contained in Section 186, but by the more limited schemes set forth in Section 105.*

5 NRC at 1317 (footnote omitted, emphasis supplied).

Any lingering doubt about the Commission's view of the limited role Section 186 plays in antitrust matters is put to rest by its further pronouncement in that same case that, on the "question whether Section 186 expands the antitrust hearing settings defined in Section 105 . . . we find that the generality of Section

[11] *Houston Lighting and Power Co.* (South Texas Project), CLI-77-13, 5 NRC 1303 (June 15, 1977) petition for judicial review pending). This decision was not rendered on appeal from ALAB-381 (our *South Texas* ruling, *supra*) but in an independent proceeding on a staff recommendation that an antitrust hearing be convened in that case in the exercise of the Commission's discretion.

[12] Except perhaps as necessary to enforce the terms of a license or to revoke one fraudulently obtained, or in circumstances where a plant is sold or so significantly modified as to require a new license. See CLI-77-13, *supra*, 5 NRC at 1318.

186 should be treated as subordinate to the specific, limited regime adopted by Congress as recently as the 1970 amendments to the Act." *Id.* at 1311.

To put the whole matter another way, arguments to this Board about the most "common sensical" way to interpret the antitrust provisions of the Atomic Energy Act in general, or Section 186 in particular, fall wide of the mark. Whether we agree with those arguments or not, they are made in the wrong forum. Unless and until the Commission elects to modify its *South Texas* rulings, or is instructed to do so by Congress or the courts, this Board is of course constrained to apply them.

The result for this case is thus ineluctable. Prelicensing antitrust review of these reactors was proscribed by Congress and, even were that not true, postlicensing review is foreclosed by the Commission's *South Texas* decision. The Director of Nuclear Reactor Regulation is not an island of independent authority; his office is a piece of the Commission, "a part of the main." Therefore, the Florida Cities need not send to the Director to learn for whom antitrust jurisdiction tolls when an operating license issues; it tolls for him.

For the foregoing reasons, we (1) *affirm* that portion of the Licensing Board's April 5, 1977, order from which the Florida Cities appeal and (2) *declare* that the Director of Nuclear Reactor Regulation has no authority to initiate an antitrust review in connection with any of these three power reactors on the basis of the petition now before us.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING APPEAL BOARD

Margaret E. Du Flo
Secretary to the Appeal Board

Concurring Opinion of Mr. Sharfman:

I join in the opinion of my colleagues except with respect to one point. They would affirm the Licensing Board's dismissal of the petition insofar as it relates to the three fully licensed reactors on the basis of their holding in *South Texas* (ALAB-381, *supra*) that a licensing board is barred by 10 CFR §2.717(a) from granting a late petition for an antitrust hearing after all environmental and safety proceedings with respect to issuance of the construction permit have concluded. I disagreed with that holding, for reasons which I stated at length in

my concurring opinion in that case.[1] As is true with a denial of *certiorari* in the Supreme Court, the Commission's election not to review one of our decisions does not necessarily constitute an endorsement of it. In this particular instance, the Commission went out of its way to make that clear. In its own decision on the other aspect of *South Texas*, it said: "In declining to review ALAB-381, of course, we are not to be taken as having agreed with everything that the Appeal Board had said in that opinion."[2] The Commission apparently was content simply to let the result in ALAB-381, a result in which I fully concurred, stand. I therefore persist in my disagreement with the majority of this Board as to its construction of 10 CFR §2.717(a).

Because, in my view, §2.717(a) does not provide any basis for the denial of the petition, it is necessary, as I stated in *South Texas*, to see whether the grant of an antitrust hearing after all proceedings on licensing have concluded would be consistent with the legislative intent underlying Section 105c of the Atomic Energy Act.[3] The Commission has, however, already given us its views in *South Texas* on the intent of Congress with respect to our antitrust jurisdiction over reactors as to which licenses have already been granted. As the majority opinion shows, those views leave not the slightest room for doubt as to what our decision in this case must be.

[1] 5 NRC 595.
[2] CLI-77-13, 5 NRC 1303, 1308 (June 15, 1977).
[3] 5 NRC at 598-99.

Cite as 6 NRC 538 (1977) CLI-77-26

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Joseph M. Hendrie, Chairman
Victor Gilinsky
Richard T. Kennedy
Peter A. Bradford

In the Matter of

FLORIDA POWER & LIGHT COMPANY

(St. Lucie Nuclear Power Plant, Unit 1) **Docket Nos. 50-335A**

(Turkey Point Plant, Units 3 and 4) **Docket Nos. 50-250A**
50-251A

October 25, 1977

The Commission decides not to review ALAB-428, 6 NRC 221 (1977), but directs the staff to refer antitrust allegations concerning three fully licensed plants to the Attorney General.

ORDER

The Commission has decided not to review ALAB-428. We note, however, the request of the petitioners that if the Commission fails to grant the Petition, a reference of their allegations be made to the Attorney General.

In a recent decision, *Houston Lighting & Power Company* (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303 (1977), we discussed our antitrust responsibilities, as set forth in Section 105 of the Atomic Energy Act, as amended, 42 U.S.C. 2135. There we stated that "antitrust allegation might be raised outside the license review context. Subsequent allegations that licenses are being used in such a way as to violate the antitrust laws are to be referred to the Department of Justice for investigation

and possible enforcement action . . . ." 5 NRC at 1312. The Florida Cities petition contains such allegations.

The staff is therefore directed promptly to refer to the Attorney General the allegations of the Florida Cities, as well as "any [related] information it may have [if any] with respect to any utilization of special nuclear material or atomic energy which appears to violate or to tend toward the violation" of any of the antitrust laws. 42 U.S.C. 2135(b).

It is so ORDERED.

By the Commission

Samuel J. Chilk
Secretary of the Commission

Dated at Washington, D. C.,
this 25th day of October 1977.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:
Marcus A. Rowden, Chairman
Victor Gilinsky
Richard T. Kennedy

In the Matter of **DOCKET Nos. 50-498A**
50-499A

HOUSTON LIGHTING & POWER COMPANY
THE CITY OF SAN ANTONIO
THE CITY OF AUSTIN and
CENTRAL POWER AND LIGHT COMPANY

(South Texas Project, Unit Nos. 1 and 2)

June 15, 1977

Under 10 CFR § 2.758, co-applicant Houston Lighting and Power Company moved the Commission to waive the requirement that initiation of operating license antitrust review procedures await submission of the FSAR, which, by Commission rules, must accompany the filing of an application for an operating license. The Commission, in an opinion delineating its antitrust jurisdiction, authorizes the Director of Nuclear Reactor Regulation to accept the application for the operating license without the FSAR and directs the Nuclear Regulatory Commission staff to seek the Attorney General's advice on whether changed circumstances have occurred within the meaning of Section 105c(2), which would warrant the holding of an operating license antitrust hearing.

ATOMIC ENERGY ACT: ANTITRUST JURISDICTION

Section 105 of the Atomic Energy Act defines the Commission's antitrust responsibilities; the broad powers that the Commission has by virtue of Section 186 to revoke or to modify existing licenses is subordinate in regards to antitrust matters to the regime set out in Section 105.

ATOMIC ENERGY ACT: ANTITRUST JURISDICTION

The Commission's authority to initiate an antitrust review is limited to the scheme of prelicensing antitrust review established by Section 105c. That section requires all applications for a construction permit to undergo antitrust scrutiny and allows a second review at the operating license stage if in the interim significant changes have occurred in the licensee's proposed activities.

ATOMIC ENERGY ACT: OPERATING LICENSE ANTITRUST REVIEW

In contrast to the more thorough antitrust review at the construction permit stage, the scope of antitrust review at the operating license stage is more limited, focusing on significant changes, if any, that have occurred in the licnesee's activities since the construction permit antitrust review; however, in analyzing allegations of significant changes, some account may be taken of the unchanged features of the proposal as a whole.

Mr. J. A. Bouknight, Jr. (with whom Messrs. Robert Lowenstein, Finis E. Cowan, Charles G. Thrash, Jr., J. Gregory Copeland, R. Gordon Gooch, and John P. Mathis were on the brief) for the Houston Lighting & Power Company.

Mr. Jon C. Wood (with whom Mr. W. Roger Wilson was on the brief) for the City of San Antonio.

Mr. George K. Elbrecht (with whom Messrs. Jerry L. Harris and Don R. Butler were on the brief) for the City of Austin.

Mr. Michael I. Miller (with whom Messrs. Richard D. Cudahy, Joseph Gallo, and Robert F. Loeffler were on the brief) for the Central Power and Light Company.

Mr. Jay M. Galt for Committee for Power for the Southwest, Inc.

Mr. Raymond W. Phillips (with whom Mr. John D. Whitler was on the brief) for the United States Department of Justice.

Mr. Martin G. Malsch (with whom Messrs. Joseph Rutberg and Michael B. Blume were on the brief) for the Nuclear Regulatory Commission staff.[1]

MEMORANDUM AND ORDER

The Houston Lighting & Power Company (Houston), Central Power and Light Company (Central), and the Cities of San Antonio and Austin, Texas, are joint holders of construction permits for the proposed South Texas Project, Unit Nos. 1 and 2. When the application for construction permits was filed in May 1974, a copy was transmitted to the Attorney General seeking his advice whether a hearing should be held to consider possible antitrust implications, as required by Section 105c(1) of the Atomic Energy Act. By letter of October 22, 1974, the Attorney

[1]Pursuant to the Commission's order of April 27, 1977, the parties to certain proceedings involving Florida Power & Light Co. nuclear facilities were granted leave to file amicus curiae briefs and reply briefs in this proceeding. A brief from a group of Florida municipal utilities and reply briefs from the regulatory staff and Florida Power & Light Co. were subsequently received and have been considered in our disposition of this matter.

General responded in the negative. His letter was duly published in the *Federal Register*, with a notice of opportunity for any interested person to file a petition for leave to intervene and to request a hearing on the antitrust aspects of the proposed project. No such petition was filed and, consistent with the Attorney General's advice, no antitrust proceeding was initiated.

During that same period of time, the health, safety and envrionmental review of the South Texas Project went forward. An initial decision favorable to the applicants was issued in late 1975 (LBP-75-71, 2 NRC 894), construction permits were duly issued, and the Atomic Safety and Licensing Appeal Board affirmed the initial decision in early 1976. ALAB-306, 3 NRC 14. The Commission chose not to review the Appeal Board's decision, and judicial review was not sought within the prescribed time. At that point, the construction permit proceeding, including its antitrust review aspect, had come to an end.

The events recited hereafter are those upon which the parties appear to be in general agreement. In May 1976, following the time when judicial review of the construction permit proceeding might have been sought, Houston broke off interconnections between its distribution system and the systems of certain other utilities, including its co-licensee here, Central Power and Light. This action occurred after Central had established an interconnection between its distribution facilities and those of certain out-of-state utilities.[1] Prior to the establishment of this interconnection, the distribution system of which Houston and Central were part had served only Texas intrastate commerce. We understand that, for this reason, Houston and other intrastate Texas utilities have not in the past been, and are not now, regulated by the Federal Power Commission, a situation

[1] Central's brief indicates that this took place "as a result of interstate transmission of electricity by [West Texas Utilities]," a wholly owned subsidiary of Central's holding company, Central and Southwest Corporation. Brief at p. 6.

Houston would apparently prefer to maintain. Central is owned by a parent holding company subject to the Public Utility Holding Company Act of 1935, and the requirements of that Act[2] may have been a factor in Central's apparent decision to enter interstate commerce and thus to subject aspects of its operations to regulation by the Federal Power Commission. Houston casts its disconnection of Central in a defensive mold, as a means of avoiding its being caught in the net of interstate commerce and, thus, Federal regulation.

These apparently interrelated actions have been matched by a complex set of judicial and administrative actions. Houston responded to Central's interstate connection by seeking an order from the Texas Public Utility Commission to require Central to sever that connection. Houston's claim, also made in the judicial action shortly to be described, is that Central is contractually and legally bound to preserve the intrastate character of the "Texas Interconnected System," of which both it and Central are a part

[2] The Act, 15 U.S.C. 79 *et seq.*, allows registered holding companies to "continue to control one or more additional integrated public utility systems," in certain circumstances. To be so allowed, the SEC must find that

> (A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;
>
> (B) All of such additional systems are located in one state, or in adjoining states, or in a contiguous foreign country; and
>
> (C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

15 U.S.C. 79K.

and which the South Texas Project was intended to serve. By a submission dated May 4, 1977, Houston has brought to our attention an "interim order" of the Public Utility Commission, issued on May 2, 1977, directing resumption of interconnections between Houston and Central and disconnection by Central of the interstate ties.[3] Houston further informs us that "physical reconnection of the Texas Interconnected Systems in accordance with the interim order has been completed." On May 18, 1977, Central requested that the United States District Court for the Western District of Texas declare invalid and set aside the interim order of the Utilities Commission.

Central's interconnections with out-of-state utilities are under scrutiny in a proceeding pending before the Securities and Exchange commission under the Public Utility Holding Company Act of 1935, involving Central's parent holding company. Houston tells us (Brief p. 26) that the SEC proceeding could moot any NRC antitrust proceeding, but Central disputes this (Brief pp. 21-23). Central's pursuit of interstate regulation[4] had let it, with other subsidiaries in its system, to file a petition

[3]That order provides in part

> It is therefore the ORDER of this Commission that the parties hereto immediately reestablish the Texas Interconnected System as it existed on May 3, 1976, and as contractually agreed to by such parties and that any and all disconnects which must be made to remove the contract impediments to such reconnection be made immediately.

In late May, the Utility Commission issued a "final order" confirming and approving the above cited interim order.

[4]The facts recited are those upon which the parties appear to be in general agreement. We do not mean to ascribe a motive to this conduct. Central and Houston each aver that its actions are intended to benefit its consumers through obtaining more reliable, lower cost electricity under a more efficient regulatory system. We need not decide at this juncture whether this or some other purpose drives either in the present jurisdictional dispute.

with the Federal Power Commission seeking Commission exercise of regulatory authority over it. The results of that proceeding are conjectural at this point, but it appears that one possible result would be to establish FPC jurisdiction over Houston, on account of its interconnections with Central.

In response to Houston's breaking off of interconnections, Central has also filed a civil action in Federal district court in Texas alleging violations of the Sherman Act, and seeking an injunction against interruptions of interconnected service. Houston has counterclaimed in this suit, denying any antitrust violations and seeking an order compelling performance of Central's obligations under its contractual arrangements for the construction of the South Texas Project.

We come now to the proceedings raising these issues before the Commission. The matter first came formally to our attention in June 1976, when Central filed a petition which styled itself a response to the notice of opportunity for antitrust hearing which had been published some 19 months earlier. Central, a co-applicant, had received the earlier notice, but it maintained that "good cause" now existed for allowing it to intervene and obtain an antitrust hearing. It contended that Houston's breaking off of interconnections was a supervening development which warranted the imposition of antitrust conditions. The disposition of that petition is outlined in detail in the Appeal Board's decision in ALAB-381, 5 NRC 582 (March 18, 1977), and need not be restated here. Central prevailed before the licensing board to which its petition had been routinely referred, despite our staff's opposition on jurisdictional grounds that the construction permit proceeding having been terminated, the antitrust issues associated with it could not be reopened. On appeal by our staff the Appeal Board reversed (ALAB-381), agreeing with the staff that the construction permit proceeding had formally come to an end with the expiration of time to seek judicial review, and that the licensing boards lacked delegated authority to reopen such proceedings.

As matters developed before the Appeal Board, all parties agreed that an antitrust hearing should be held at the earliest opportunity, differing only on the appropriate procedure for accomplishing that objective. Following argument before theAppeal Board, Houston suggested that we permit an early beginning to the statutory antitrust review provided for in certain cases at the operating license stage, by waiving the requirement that initiation of staff operating license review procedures await the applicant's submission of a Final Safety Analysis Report (FSAR). This suggestion was placed before us on February 10, 1977, in a formal motion for waiver of Commission rules pursuant to 10 CFR §2.758.[5] Our staff believes that, as a joint licensee, Central's intervention petition may be treated as a request for construction permit amendments, under 10 CFR §50.90, requiring Houston to interconnect with it, and that the Commission may thereupon direct, pursuant to 10 CFR §2.104, that an antitrust hearing be held on the request. The Staff also believes that initiation of a show cause proceeding under 10 CFR §2.202 would be "legally permissible." In February 1977, the first staff suggestion was placed before us in a staff paper which we caused to be served on the participants herein, with an invitation for response. The Department of Justice, which did not appear before the Appeal Board, suggested in a January 25, 1977, letter to the Executive Legal Director that "the Department can see no reason why the hearing should not proceed at this time, rather

[5]The procedure prescribed by 10 CFR §2.758 for seeking waiver of a Commission rule is by its terms literally applicable to ongoing adjudicatory proceedings, not to a request for waiver for the purpose of facilitating initiation of a proceeding. Nevertheless, we believe that under the circumstances Houston properly invoked this rule and that its request for waiver was properly addressed directly to the Commission. Although requests under the rule are normally addressed to the presiding officer in the ongoing proceeding, such requests must be certified to the Commission for decision if a *prima facie* showing is made. No party objected to Houston's invocation of the 10 CFR §2.758 waiver procedure.

than awaiting the filing of the application for a operating license," but it proffered no specific legal basis for that view. finally, the Appeal Board suggested, in *dictum*, in its opinion of March 18, ALAB-381, that the Commission had the authority to order a hearing at this time. Alternatively, the Board believed that the Director of Nuclear Reactor Regulation could order an antitrust hearing through the issuance of an order to show cause under 10 CFR §2.202.

In our order of March 31, 1977, we announced our decision not to review ALAB-381 and our intention to rule on the Houston motion and the staff suggestion following briefing and oral argument, in which we invited the Department of Justice to participate. In declining to review ALAB-381, of course, we are not to be taken as having agreed with everything that the Appeal Board had said in that opinion.

It might appear that a dispute over the procedure to be followed for initiating a hearing, where the parties largely agree that a hearing should be held,[6] should not have major implications for the regulatory process. However, the sharp divergences among the parties over the appropriate legal basis for holding a hearing now have surfaced significant issues for resolution. The legal basis for going forward now will determine the scope of the proceeding — whether the entire proposal will be open to scrutiny *de novo*, as during the construction permit

[6]Central, the regulatory staff and the Department of Justice agree that a hearing should be held. In its brief, Houston took the position that it did not object to determining whether there had been a "significant change" in the South Texas proposal since the construction permit review. At oral argument, Houston asked as its first preference that the rule that no hearing would be necessary now or, barring other changes with antitrust implications, at the operating license stage. San Antonio and Austin are opposed to a hearing but agree with Houston that if a hearing is necessary, it should begin now to prevent possible delay in issuance of an operating license.

proceeding, or whether it is only the antitrust implications of significantly changed circumstances that are relevant, and there may be questions of finality in the event that further changes should occur before operating licenses are ready for issuance. More fundamentally, as developed in our analysis of the statutory language and its legislative history, resolution of this dispute requires a definition of the scope of our responsibility in enforcing the antitrust laws and the policies underlying them in relation to the enforcement responsibilities of other agencies, particularly the Department of Justice. Some of the parties' arguments would assign to us a broad and ongoing antitrust enforcement role; they envision that we would have a continuing policing responsibility over the activities of licensees throughout the lives of operating licenses. As we shall show, we believe that the congress envisioned a narrower role for this agency, with the responsibility for initiating antitrust review focused at the two-step licensing process.

Section 105 of the Atomic Energy Act, as amended, defines the Commission's antitrust responsibilities. That section, as most recently amended in 1970, establishes a particularized regime for the consideration and accommodation of possible antitrust concerns arising in connection with the licensing of nuclear power plants. The statute contemplates imposition of conditions in connection with our issuance of construction permits and, in some circumstances, at the operating license stage where necessary to remedy situations inconsistent with the antitrust laws.

The section's three subdivisions reflect three distinct forms of Commission responsibility. Thus, subsection (a) provides for enforcement of antitrust judgment reached elsewhere. It expressly confirms that nothing in the Act "shall relieve any person from operation" of the full range of the antitrust laws including the Sherman, Clayton and Federal Trade Commission Acts:

> In the event a licensee is found by a court of competent jurisdiction, either in an original action in that court or in a proceeding to enforce or review the findings or orders of any Government agency having jurisdiction under the laws cited above, to have violated any of the provision of such law *in the conduct of the licensed activity*, the Commission may suspend, revoke, or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this Act. (Emphasis added.)

Subsection (b) requires the Commission to report promptly to the Attorney General any information it may have with respect to any "utilization of special nuclear material or atomic energy which appears to violate or tend toward the violation" of any of the listed antitrust laws, or to restrict free competition in private enterprise, but provides no enforcement or hearing initiation responsibility with respect to this information.

A responsibility for initiating and conducting a hearing process is set out in Section 105. Subsection (c) spells out an intricate procedure by which the Commission solicits the views of the Attorney General on possible antitrust implications of each application for permission to construct a commercial power reactor. Any such license application shall "promptly" be transmitted to the Attorney General who shall, "within a reasonable time, but in no event to exceed 180 days after receiving a copy of such application. . . render such advice to the Commission as he determines to be appropriate in regard to the finding to be made by the Commission pursuant to paragraph (5) of this subsection." Paragraph (5) of subsection (c) requires the Commission to determine, in cases where an antitrust proceeding is held, "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. . . ."

Upon receipt of the Attorney General's advice, the Commission must publish the advice in the *Federal Register*. The

Attorney General may advise that there will be adverse antitrust aspects to the licensee's proposal, and recommend a hearing. In such a case, the Attorney General may participate "as a party in the proceedings thereafter held by the Commission on such licensing matter in connection with the subject matter of his advice." Thus, the Act provides for in-depth antitrust review, with the assistance and advice of the Attorney General and the possibility of a full scale adjudicatory hearing at his request or the request of a private party, at the construction permit stage.

For reactors which have undergone subsection (c) antitrust review in connection with a construction permit application, paragraph (c)(2) governs the question of antitrust review at the operating license state. It requires the Commission to make a threshold determination before the Attorney General's advice concerning a possible second antitrust proceeding can be sought namely a finding that the licensee's activities have significantly changed subsequent to the construction permit antitrust review. The language of paragraph (c)(2) is explicit:

> . . . paragraph (1) [which sets forth construction permit antitrust review procedures] shall not apply to an application for a license to operate a utilization or production facility. . . unless the commission determines such review is advisable on the ground that *significant changes in the licensee's activities* or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility. (Emphasis added.)

No part of the Atomic Energy Act other than Section 105 explicitly deals with antitrust matters. Under Section 186 of the Act, however, the Commission has general authority to revoke licenses for any reason which would have warranted the Commission in refusing to grant a license on an original

application. The power to revoke would normally imply the lesser power to modify licenses to incorporate conditions which would have been imposed at the time of initial licensing had subsequently developed circumstances than been known. If this reasoning applies to our antitrust responsibilities, Commission initiated antitrust hearings would be possible beyond the limited circumstances set forth in Section 105. Indeed, all concede that other language in Section 186 gives the Commission authority to initiate a postlicensing enforcement proceeding in the event of violation of a specific antitrust licensing condition.[7] For like reasons, we would not be limited to mere reference to the Attorney General if a license applicant had falsified pertinent antitrust review information or had otherwise obtained an unconditioned license by some sort of fraud or concealment, but no such allegation is contained in the matter before us now. It is the further question whether Section 186 expands the antitrust hearing setting defined in Section 105, however, that drives the current debate. For the reasons that follow, we find that the generality of Section 186 should be treated as subordinate to the specific, limited regime adopted by Congress as recently as the 1970 amendments to the Act.

Houston argues that, with narrow exceptions not relevant here, our authority to initiate antitrust review is limited to the Section 105 licensing context. In the present circumstances they contend that a hearing at this juncture could only be an operating license hearing based on "changed circumstances" and suggest that we waive the FSAR filing requirement for proceeding with such a hearing if we believe a hearing otherwise appropriate. Our staff, Central Power and Light Company, the Department of Justice and the Florida Cities in an amicus filing argue that the Commission is empowered to consider antitrust matters at any time, regardless of the pendency of an operating license or

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[7] The section authorizes initiation of proceedings in several specific circumstances, including a "failure to. . . operate a facility in accordance with the terms of the . . . license."

construction permit application, under Section 186 of the Act. The Department also finds authority in Section 161 of the Act, empowering the Commission to "hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter or in the administration or enforcement of this chapter. . ." The Florida Cities amicus filing argues that "the Act nowhere states that Section 105 alone provides the Commission with the means it may use to enforce the procompetitive policies of the Act." Brief amicus curiae of Florida Cities at 34. Finally, we are asked by Central and the staff to construe Central Power and Light Company's antitrust allegations as an application for a "modification" of the Construction permits which if granted would "constitute a new or substantially different facility," triggering antitrust review under 10 CFR §50.90.

These are ingenious and in some respects appealing arguments. Especially significant in our view, however, is the extent to which these arguments avoid or strain the language of Section 105.

We find the specificity and completeness of Section 105 striking. The section is comprehensive; it addresses each occasion on which allegations of anticompetitive behavior in the commercial nuclear power industry may be raised, and provides a procedure to be followed in each instance. The Act links Commission antitrust review with the licensing process demanding a thorough antitrust review at the stage of application for the construction permit and allowing a narrower second review at the operating license state, if such a review is deemed advisable on the basis that significant changes have occurred in the licensees activities. The clear implication of the "significant change" language is that the holder of a construction permit is not subject to a second antitrust review at the operating license stage unless "significant changes" in the proposed project with antitrust implications have occurred in the interim. Nor can it reasonably be argued that Congress did not foresee that antitrust

allegations might be raised outside the license review context. Subsequent allegations that licenses are being used in such a way as to violate the antitrust laws are to be referred to the Department of Justice for investigation and possible enforcement action, and if violations are found by a court, the Commission is given express statutory authority to take such license-related remedial action as is necessary.[8]

This reading of the statute is supported by its legislative history. The present language of Section 105 was fashioned in the 1970 amendments to the Atomic Energy Act. Concern with the competitive aspects of licensing in the nuclear area, however, goes back to the original legislation enacted in 1946; anticipatory antitrust review in the licensing context, coupled with referrals to

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[8]It is important to remember that the Atomic Energy Act permits licensing only if specific findings are made that "the utilization or production of special nuclear material will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public." Section 181. This standard is unlike one which authorizes licensing (or rate setting) under a broad "public interest" standard. In the latter case, agencies pursuing the objectives of the regulatory statute weigh a multitude of factors, including the effect of the proposed action on competitors and the general competitive situation, *see e.g. McLean Trucking co.* v. *U.S.*, 321 U.S. 67 (1974). It is not surprising, therefore, that the antitrust jurisdiction of the Commission is specific, rather than general. This reflects the nature of the Commission's other responsibilities with respect to nuclear plants a responsibility that is not plenary but specific. For example, under Section 271 of the Atomic Energy Act this Commission has no authority to regulate certain economic aspects of nuclear plants, such as rates. Thus, cases decided in the context of broad regulatory statutes, cited to us primarily by the Florida Cities amicus brief, are less persuasive than might otherwise be the case. See *City of Lafayette* v. *SEC*, 454 F.2d 941, 948 (D.C. Cir. 1971).

the Attorney General, began then.[9] In 1954, the Congress rewrote the Atomic Energy Act to provide for domestic development of atomic energy, with a two-stage licensing process for privately owned reactors. Under Section 104(b) of the Act, licenses could be obtained for the construction of reactors involved in the conduct of research and development activities without antitrust review. Not until a demonstration of the "practical value" of such facilities for industrial or commercial use, or in the event of licensing under Section 103 of the Act, would the then-Section 105(c) provisions, requiring antitrust review and possible conditioning of licenses come into play.

Such a "practical value" finding was never made,[10] but in 1970 Congress found nuclear power to have acquired

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[9]Section 7(c) of the Atomic Energy Act of 1946 provided that

> Where activities under any license might serve to foster the growth of monopoly, restraint of trade, unlawful competition, or other trade position inimical to the entry of new, freely competitive enterprises in the field, the commission is authorized and directed to refuse to issue such license or to establish such conditions to prevent these results as the Commission, in consultation with the Attorney General, may determine. The Commission shall report promptly to the Attorney General any information which it may have with respect to any utilization of fissionable material or atomic energy which appears to have these results.

[10]*Cities of Statesville v. AEC*, 441 F.2d 962 (D.C. Cir., 1969) represents an effort by certain municipalities and others to have the Commission consider, in the context of Section 104(b) public health and safety and national security licensing, whether issuance of the license would violate provisions of the antitrust laws. In an *en banc* decision, the D.C. Circuit found that Congress had not intended that the 105(c) antitrust provisions of the then-Act be injected into 104(b) licensing. Rather, Congress had intended that Section 105(c) be

"commercial value," and amended the Act to remove the "anachronism" requiring an AEC finding of commercial value. 116 Cong. Rec. H. 9447 (daily ed., September 30, 1970). changes in the two-step licensing procedure made clarification of the provisions governing antitrust review necessary. The legislation that emerged was characterized by Senator Pastore, a member of the Joint Committee on Atomic Energy, as a "carefully perfected compromise" and a "balanced, moderate framework for a reasonable licensing review procedure." 116 Cong. Rec. 19253 (daily ed., December 2, 1970).

Throughout the hearings and debates runs a consistent thread. What was at stake was "prelicensing" or "anticipatory" antitrust review. This theme was emphasized by Congressman Hosmer, who stated

> By like token, this bill in no way enlarges the substance of the antitrust review in any respect over the provisions of the existing law for commercial licenses. What we are trying to do is clear away procedural uncertainties in the manner in which both the Justice Department and the AEC are to proceed. 116 Cong. Rec. H9447 (daily ed., September 30, 1970)[11]

"patently restricted to Section 103 licensing. . . In effect then, the commission is barred, with certain exceptions (such as §103 licensing) from considering *affirmative anticipatory* antitrust sanctions" (emphasis in the original). With respect to 104(b) licenses, the Commission could only suspend, revoke, or take other such action with respect to a license as it deemed necessary after a court finding of monopoly.

It is significant that in discussing the Commission's duties under Section 105(c), the court several times referred to its duty there to consider *"anticipatory* antitrust impact."

[11]Congressman Hosmer took care to emphasize as well that ". . . this whole antitrust review in the Commission's licensing procedure in no way extends, impairs, amends, or affects any of the antitrust laws or prevents their application. This major point is underwritten by subsection 105(a) of the Atomic Energy Act, which remains unchanged," *Id.*

On the one hand, the Congress was urged "not to burden nuclear plants with a special prelicensing antitrust review." Testimony of Carl Horn, Jr., for Edison Electric Institute, Hearings on P; -license Antitrust Review of Nuclear Power Plants before the Joint Committee on Atomic Energy, 91st cong., 2d Sess., (hereinafter "Hearings") at p. 328. Opponents of any agency antitrust review argued strenuously that applicants for nuclear facility licenses were subject to the antitrust laws "all the time, and if we are violating them in any way, it is not in building any specific plant; it would be in the marketing of our total system power." *Id.*

But even among those who argued in favor of prelicense review, no evidence emerges that anything more than license connected review was considered. There is no hint in the legislative history that anyone advocate or foe of prelicensing review anticipated anything more. Indeed, the reasons underlying support for the bill as enacted indicate the importance of *anticipatory* review to its advocates. *See e.g.*, statement of Charles A. Robinson, Jr., Staff Counsel to the General Manager, National Rural Electric Cooperative Association, *Hearings* at 420:

> The big advantage of antitrust review at the prelicensing stage is, in our view, its remedial practicality. Briefly stated, it shifts the procedural burden to the applicant, where it rightfully belongs. He is not stigmatized as a wrongdoer. And he has, during the licensing procedure, a time-related incentive to expedite the entire process and to comply with reasonable antitrust safeguards before any competitor is damaged. Problem areas can be anticipated and avoided with minimum disturbance to all parties.
>
> None of these advantages accrue to the classical, after-the-fact antitrust prosecution, wherein the defendant's interest lies in delay while competitors suffer during years of frequently inconclusive litigation.

Similar reasons were cited by the Acting Assistant Attorney General for the Antitrust Division who contrasted prelicensing review with more general antitrust enforcement, stating "facing [these questions] at the outset of the licensing proceeding, and obtaining the Attorney General's advice on the issues, can permit an early and orderly resolution of antitrust problems before much money and time has been spent." Statement of Walker B. Comegys, *Hearings* at 121. And in response to urgings by Congressman Hosmer to employ traditional antitrust remedies in the nuclear field, the Assistant Attorney General stated: "As to those matters which are closed, namely both licenses having been granted, that is the only recourse available to us." *Hearings* at 140. It is difficult to reconcile these statements on the part of the active supporters of prelicensing review with the view that the Congress was considering placing a general antitrust policing authority in the Commission.

An area of special concern during consideration of the 1970 amendments centered on whether antitrust review should take place at both the construction permit and operating license stages. The AEC proposed that review take place at both stages, with a mechanism to "exclude from consideration at the operating license stage cases that had been handled at the constructive permit stage to the satisfaction of the Justice Department" at 38.

Chairman Holifield expressed considerable concern about this suggestion (*Hearings* at 37-38):

> I am concerned with the mandatory requirement in the AEC bill review at both the construction and operating license stages. It seems to me that the Joint Committee's bill which requires mandatory review on the antitrust problem at the construction stage is a practical and sound way to approach it. I think if you

hold over the head of any investor of $100 million in a plant, let us say, the fact that he builds the plant to channel the power into his own system of distribution, at that point he should be made aware of any diversion from that plant to another source. He should not be put in a position, it seems to me, of double jeopardy in that he is given the construction permit to proceed without antitrust review and then suddenly 6 years later, or 7 years, whenever his plant is finished, he is faced with an intervenor or a legal situation in which he has to go again through the process of antitrust review.

. . .here again you have a permissive act on your part, and a benevolent act on your part, or an antagonistic act at this time, 5 or 6 or 7 years later, after the investment has been made and the plans of the utility, regardless of who they might be, were made at the time of construction as to the feed-in of that power into their systems.

Suddenly they are faced with a diversion, let us say, of 25 or 30 or 40 percent of their power into another system. So, it seems to me that the Joint Committee's position of mandatory review before construction as far as the antitrust problem is concerned ought to be final in fairness to the investors. They go in then with their eyes open and they are treating the problem on the basis of a determined fact which does not damage their prior planning and the reason for investing in the first place.

I seems to me that this should be mandatory rather than depending upon an act of permissiveness or benevolence.

Chairman Holifield's concerns were reflected in the final language of the section, providing for thorough review at the

construction permit stage, and a second review only upon the finding of "significant changes." The section-by-section analysis of the bill, presented on the floor of the Congress by Chairman Holified, stated ". . . The committee sees no sense in two such [antitrust review] exercises unless there have been significant intervening changes." This limitation on the scope of antitrust review at the operating license stage is inconsistent with the notion of ongoing antitrust enforcement responsibility being lodged in this agency.

Thus, we think Congress contemplated that this Commission would review antitrust allegations primarily, if not exclusively, in the context of licensing, and that such review would take place in a two-step review process, the second such review of a more limited scope than the first.

In addition to the statutory language and its legislative history, such a legislative scheme is most consistent with this Commission's special responsibilities. There are strong policy reasons why this Commission has expansive health and safety jurisdiction, which continues through the lives of outstanding licenses. Nuclear power is an area of considerable technical complexity. Its governance should be entrusted to an agency which embodies that particular expertise. But in the field of antitrust, our expertise is not unique. We merely apply principles, developed by the Antitrust Division, the Federal Trade Commission, and the Federal courts, to a particular industry. Through the licensing process, we can effectuate the special concern of Congress that anticompetitive influences be identified and corrected in their incipiency. No nuclear power can be generated without an NRC license and the licensing process thereby allows us to act in a unique way to fashion remedies, if we find that an applicant's plans may be inconsistent with the antitrust laws or their underlying policies.

But in the postlicensing posture, this Commission's capacity to act is not unique. There is no longer any question of "lock[ing]

the barn door before the horse is stolen. . . ." Statement of Senator Pastore, III Legislative History of the Atomic Energy Act of 1954, at 3107 (1955). When nuclear power plants have been constructed and are operating, anticompetitive behavior can be remedied only by modifying or conditioning existing behavior. Whatever form of remedy the agency can offer is not appreciably different from that which may be fashioned by the traditional antitrust forums. In this posture, we recognize, as did the Congress, that there are more suitable forums for antitrust enforcement.

Nevertheless, relying on dictum from the *Cities of Statesville* case, Central and others argue that we have general antitrust police powers in the nuclear industry pursuant to Section 186 of the Act, and that we may thereby reopen license proceedings for cause in the event that there are allegations that a licensee's activities are anticompetitive.

The *Statesville* case actually held that Congress intended Commission antitrust review only in certain limited circumstances. N.10, *supra*. In the course of the opinion, however, the Court reviewed briefly the Commission's antitrust responsibilities as they then existed and made the statement relied on here:

> This section [186] invests the Commission with a continuing "police" power over the activity of its licensees and provides it with the ability to take remedial action if a license is being used to restrain trade.

This *dictum* is a weak foundation upon which to build a claim of such wide ranging powers. The statement itself is amenable to another interpretation more consistent with holding of the *Statesville* case itself: The Court of Appeals may have been speaking of this Commission's continuing police power over conditions properly placed on licenses, after 105(c) antitrust

review. In any event, the Congressional contemplation of a more restricted antitrust review function reflected in the 1970 amendments is inconsistent with a broad reading of the quoted *Statesville* dictum.

In summary then, we conclude that Congress had no intention of giving this Commission authority which could put utilities under a continuing risk of antitrust review. Had Congress agreed with the proposition that this Commission should have broad antitrust policing powers independent of licensing, the statute that emerged from these discussions would have looked quite different. Little attention would have been paid to defining a two-step review process. The terminology of all participants in the drafting process would not have been focused directly on "prelicensing" review. And, if a broad, ongoing police power in the antitrust area had been assumed, the language in 105(a) authorizing the commission to act with respect to licenses already issued, in light of the antitrust findings of courts would have been, if not superfluous, certainly redundant. Consequently, we find that the Commission's antitrust authority is defined not by the broad powers contained in Section 186, but by the more limited scheme set forth in Section 105.[12]

In so concluding it is not necessary for the purposes of this case to go beyond that, once an initial, full antitrust review has been performed, only "significant changes" warrant reopening. In the event a "significant change" were to occur in a licensee's activities before operating license review, this fact would make some form of antitrust review at the operating license stage

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[12]Similar reasons lead us to reject the Department of Justice's suggestion that Section 161 may serve as a source of authority independent of Section 105.

probable, absent a settlement agreeable to all parties, the Attorney General and this Commission. The only question then remaining is whether initiation of the second round, "operating license" review must await the filing of the FSAR which, by our rules, must accompany the filing of an application for an operating license.

As a matter of sound practice, such an outcome would be undesirable. Faced with the prospect of an antitrust hearing, we must realistically consider the impact of delay upon the overall licensing process. Antitrust hearings tend typically to be time consuming. Recognizing this, our regulations provide for the early and separate filing of antitrust information, at the construction permit stage, to permit the antitrust review process to be completed concurrently with other licensing reviews. *See* 10 CFR §50.33a and related Statement of Considerations, 38 Fed. Reg. 34394. Similarly here, we think that if antitrust review is found necessary in the period between issuance of a construction permit and application for an operating license, we can fashion remedies to expedite the review. This necessary flexibility can allow us to resolve antitrust allegations in a timely fashion, without unduly delaying the licensing process.

Thus we need not and do not decide whether antitrust review may be initiated in case of an application for a license amendment which would result in a "new or substantially different facility," or where an application for transfer of control of a license has been made, or where "significant changes" occur after an operating license is issued. We note, however, that the report of the Joint Committee explicitly refers to our authority to conduct a review in the first situation, H.R. Rep. No. 91-1470, 91st Cong. 2d Sess., 3 U.S. Code Cong. and Adm. News, 4981, 5010 (1970). Authority in the second situation, not explicity referred to in the statute or its history, could be drawn as an implication form our regulations. 10 CFR §50.80(b). The third situation presents the issues pending in the *Florida Power and*

Light proceeding, n. 1 *supra*, which we do not have before us and need not resolve to decide this case. We go no further than to conclude that Section 186 can have at best limited application, in light of the "significant changes" restriction of Section 105(c)(2) and its relation to the overall scheme of Section 105.

The mechanism for making "significant changes" determinations is not spelled out in our rules although an AEC Regulatory Guide, 9.3 (October 1974), sets forth information to be supplied to the staff in connection with its operating license antitrust review. The making of a "significant change" determination triggering a referral to the Attorney General for his advice on its antitrust implications is a function which could and perhaps should be delegated to the regulatory staff.[13] We intend to explore that procedural question further, possibly through rulemaking. For the present, we need only to find that an appropriate means to permit the Commission to reach the significant changes question has been suggested by the petition of Houston asking that we waive the requirement that the filing of an application for an operating license be accompanied by the filing of the FSAR. *See* 10 CFR §§50.30(d) and 50.34(b). The FSAR is a technical document which provides information necessary to evaluate the health and safety aspects of a plant in construction. Normally, however, no part of the information contained therein is related to, or sheds light upon, the impact of the operation of the plant on aspects of competition or the competitive conduct of the applicant. Our waiver of the normal requirement that this document accompany the operating license application will have no impact on antitrust review and will facilitate early consideration of the possible antitrust implications of the circumstances that have arisen in this case. Accordingly, the Director of Nuclear Reactor Regulation is authorized to accept an application for an operating license for

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[13] Existing delegations confer authority only with respect to Section 105(c)(8).

the South Texas Project without the necessity of filing with it the FSAR described in 10 CFR §50.34 (b), and to seek the information outlined in Reg. Guide 9.3.[13]

In accepting the substantial agreement among the parties that the circumstances which have developed warrant, at the least, seeking the Attorney General's advice, we are making the Section 105(c)(2) "determination" that a further antitrust review is "advisable" because of "significant changes" in the licensee's activities occurring subsequent to the antitrust review previously completed at the construction permit stage. By setting in motion the operating license antitrust review mechanism, we do not mean to imply any judgment on our part as to the necessity for a hearing, let alone any necessity for the imposition of license conditions. That judgment will be deferred as the statute contemplates pending receipt and evaluation of the Attorney General's advice and will then be made in the same manner and following the same procedures as we employed at the construction permit stage.

We decide only that the events detailed above are of such a nature as to convince us that the Attorney General must be consulted. In this regard we are aware that the staff sought the Attorney General's advice on the antitrust significance of the present interconnection dispute and that he responded by letter dated January 25, 1977. Following a summary of the facts of this dispute to that date, the Attorney General summarized the antitrust contentions of the parties as follows:

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[13] Our finding that the present record shows evidence of significant changes warranting the Attorney General's attention thus is not intended to preclude his consideration of the entire record of events subsequent to the CP antitrust review as this may be developed through the information elicited by the staff in conjunction with the application process.

> Central Power & Light has alleged that this situation substantially impairs its ability to produce competitively priced power and also that its participation in the South Texas Project will be jeopardized. Houston Lighting & Power, on the other hand, contends that it acted unilaterally, without anticompetitive purpose, to preserve its status as an intrastate utility not subject to FPC jurisdiction, and that CP&L's participation in the South Texas Project will not be adversely affected.

We need the Attorney General's evaluation of the legal significance of these various facts and contentions to determine whether an antitrust hearing is warranted. Indeed, his letter was specific that no such advice was being provided.[14]

The question upon which we are now seeking advice is why enforcement of a contract right, known to all parties and the Attorney General at the time of construction permit antitrust review, may constitute "changed circumstances" such as may justify the imposition of antitrust conditions. This is particularly critical because among the factors examined at the time the construction permits antitrust review was conducted, as indicated in the Attorney General's letter, was that "none of these utilities operated interconnected with an electric utility outside Texas so as to be subject to the jurisdiction of the Federal Power Commission (FPC), and interconnection contracts with one another were conditioned specifically to preclude interstate

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[14] The Attorney General stated that:

We need not decide the ultimate validity of CP&L's contentions or HL&P's responses to conclude that the present situation in Texas with restrictions on interutility coordination resulting from the division of the utilities in the state into two groups, premised on intrastate and interstate operation respectively, with ERS eliminated as a coordinating vehicle, and with questions raised as to the viability of planned participation in the nuclear units warrants an antitrust hearing.

connections." In addition, we believe that the Attorney General should provide us with his evaluation of the probable effects of proceedings in other forums, as they have then progressed, in developing his recommendations concerning further antitrust proceedings.

Our determination of changed circumstances foreshadows a series of subsidiary questions which need not be addressed comprehensively at the juncture, but concerning which some commission guidance is appropriate. The only stated consequence of a Commission determination that "significant changes" have occurred is that paragraph (1) of subsection 105(c) — the paragraph providing for Attorney General review and advice — applies. Paragraph (c)(2) does not explicitly state whether his consideration of any subsequent hearing is to be limited to the subsequently developed circumstances underlying the Commission determination and reference to the Attorney General. While some of the parties before us — notably Central and the Department of Justice[15] — argue against any such limitation, we have concluded that this second look at the operating license stage is to be a restricted one, focusing on the changed circumstances. The reasoning which leads to this conclusion — already suggested by our earlier discussion — is as follows.

First of all, the structure of the complex statutory scheme established by Section 105(c) strongly implies that there is to be a limited review, if any, at the operating license stage. If no "significant changes" in a construction permittee's proposed activities have occurred, then the statute is explicit that there is to be no antitrust review at the operating license stage — the antitrust review procedure "shall not apply to" such a permittee's application for an operating license. As we view it, a full-blown *de novo* antitrust review, with the Commission's "significant

[15]See transcript of oral argument, pp. 34, 54. The staff's position on this point was unclear. Transcript p. 66.

changes" determination acting only as a triggering mechanism, would be inconsistent with the statutory scheme of immunity from a second review for unchanged proposals.

Moreover, a limited scope of review at this stage is strongly suggested by the legislative history. In our earlier discussion[16] we noted the Congressional concern with possible unfairness to utilities and their investors should they be required to run the antitrust review gauntlet twice, at both the construction permit and operating license stages. Chairman Holifield expressed the view that the construction permit review should be "final to fairness to the investors." With the results of that review known to them, they could proceed with construction (or not) "with their eyes open. . . on the basis of a determined fact which does not damage their prior planning and the reason for investing in the first place." The legislative history reflects that the compromise version of Section 105(c), as enacted, contemplated limited review at the operating license stage. As Chairman Holifield stated in urging floor approval: "The Committee sees no sense in two such exercises unless there have been significant intervening changes."

Furthermore, a limited review at the operating license stage is consistent with the well established considerations consolidated in the doctrines of res judicata and laches. Although these judicially developed doctrines are not fully applicable in administrative proceedings, particularly where, as here, there was no adjudicatory proceeding at the construction permit stage, the considerations of fairness to parties and conservation of resources embodied in them are relevant here. We see no reason why the Attorney General, our staff, and possibly a hearing board should plow the same ground twice. Nor, in fairness to utilities engaged in long range planning, should a potential petitioner for antitrust intervention be able to stand on the sidelines at the construction permit stage and raise a claim at the operating license stage that could have been raised earlier.

[16]See, pp. 1315-1316, *supra*.

This is not to say that "significant changes" in a licensee's proposal can or should necessarily be viewed in isolation from unchanged features of the proposal. The antitrust implications of a "significant change" may indeed arise from its relationship to unchanged features of the proposal. Obviously, some account will have to be taken of the proposal as a whole, but as the proposal or its impacts have been altered by change circumstances.

Finally, we think it appropriate to anticipate and say a word about a possible course of events whereby the present controversy may be resolved before an operating license antitrust review would normally occur. Understandably, if there is to be an antitrust proceeding at this point, Houston would prefer that the proceedings go forward expeditiously and that there be no further such proceedings.[17] But as was observed at oral argument, we may have an unfolding sequence of circumstances here, many of which might have to be taken into account before a determination is made on antitrust matters.[18] Knowing that operating license review typically occurs a substantial period of time following construction permit issuance, Congress must have contemplated that we would consider significant changes with possible antitrust implications occurring during that period. In ordering an expedited operating license antitrust review, we are accommodating the parties' desire for an early resolution of the possible antitrust implications of the present interconnection controversy. However, this action is not to prejudice the right of the Commission to consider the antitrust implications of any subsequent developments, including developments possibly unrelated to the present dispute, so long as such consideration would otherwise have been timely under our usual antitrust review procedures. In this regard should the present dispute be resolved in a hearing, the board would be authorized to reopen the record upon an appropriate and timely showing of further changes.

[17]See transcript of oral argument at pp. 17-20.

[18]*Id.* at p. 19.

The Houston request for waiver of the FSAR filing requirement is granted. The regulatory staff is directed to seek the advice of the Attorney General pursuant to Section 105(c)(1). Any further proceedings shall be conducted in accordance with this opinion.

It is so ORDERED.

Samuel J. Chilk
Secretary of the Commission

Dated at Washington, D.C.
the 15th day of June 1977

ATOMIC ENERGY ACT OF 1954 AS AMENDED

42 USCA §2011 et seq.

§ 2011. Congressional declaration of policy

Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that—

(a) the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and

(b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.

Aug. 1, 1946, c. 724, § 1, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 921.

§ 2012. Congressional findings

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

(b) Repealed. Pub.L. 88–489, § 1, Aug. 26, 1964, 78 Stat. 602.

(c) The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

(f) The necessity for protection against possible interstate damage occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this chapter.

(g) Funds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare.

(h) Repealed. Pub.L. 88–489, § 2, Aug. 26, 1964, 78 Stat. 602.

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

Aug. 1, 1946, c. 724, § 2, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 921, and amended Sept. 2, 1957, Pub.L. 85–256, § 1, 71 Stat. 576; Aug. 26, 1964, Pub.L. 88–489, §§ 1, 2, 78 Stat. 602.

§ 2013. Purpose of chapter

It is the purpose of this chapter to effectuate the policies set forth above by providing for—

(a) a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

(b) a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress;

(c) a program for Government control of the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare, and to provide continued assurance of the Government's ability to enter into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons;

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public;

(e) a program of international cooperation to promote the common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit; and

(f) a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate.

Aug. 1, 1946, c. 724, § 3, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 922, and amended Aug. 26, 1964, Pub.L. 88–489, § 3, 78 Stat. 602.

§ 2132. Utilization and production facilities for industrial or commercial purposes

(a) Except as provided in subsections (b) and (c) of this section, or otherwise specifically authorized by law, any license hereafter issued for a utilization or production facility for industrial or commercial purposes shall be issued pursuant to section 2133 of this title.

(b) Any license hereafter issued for a utilization or production facility for industrial or commercial purposes, the construction or operation of which was licensed pursuant to section 2134(b) of this title prior to enactment into law of this subsection, shall be issued under section 2134(b) of this title.

(c) Any license for a utilization or production facility for industrial or commercial purposes constructed or operated under an arrangement with the Commission entered into under the Cooperative Power Reactor Demonstration Program shall, except as other-

wise specifically required by applicable law, be issued under section 2134(b) of this title.

Aug. 1, 1946, c. 724, § 102 as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 936, and amended Dec. 19, 1970, Pub.L. 91-560, § 3, 84 Stat. 1472.

Historical Note

1970 Amendment. Pub.L. 91-560 substituted provisions authorizing the Commission to issue licenses for a utilization section 2134(b), for such utilization or production facility, the construction or operation of which was licensed under section 2134(b) before December 19, 1970 or constructed or operated under an arrangement with the Commission entered into under the Cooperative Power Reactor Demonstration Program for provisions authorizing the Commission to issue licenses pursuant to section 2133 of or production facility for industrial or commercial purposes under section 2133, except that license may be issued under this title on a determination that such utilization or production facility has been sufficiently developed to be of practical value for industrial or commercial purposes.

Legislative History. For legislative history and purpose of Act Aug. 30, 1954, see 1954 U.S.Code Cong. and Adm.News, p. 3356. See, also, Pub.L. 91-560, 1970 U.S.Code Cong. and Adm.News, p. 4981.

§ 2133. Commercial licenses—Conditions

(a) The Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export under the terms of an agreement for cooperation arranged pursuant to section 2153 of this title, utilization or production facilities for industrial or commercial purposes. Such licenses shall be issued in accordance with the provisions of subchapter XV of this chapter and subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter.

Nonexclusive basis

(b) The Commission shall issue such licenses on a nonexclusive basis to persons applying therefor (1) whose proposed activities will serve a useful purpose proportionate to the quantities of special nuclear material or source material to be utilized; (2) who are equipped to observe and who agree to observe such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish; and (3) who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and

to protect the health and safety of the public. All such information may be used by the Commission only for the purposes of the common defense and security and to protect the health and safety of the public.

License period

(c) Each such license shall be issued for a specified period, as determined by the Commission, depending on the type of activity to be licensed, but not exceeding forty years, and may be renewed upon the expiration of such period.

Limitations

(d) No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 2153 of this title, or except under the provisions of section 2139 of this title. No license may be issued to an alien or any any[1] corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

Aug. 1, 1946, c. 724, § 103, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 936, and amended Aug. 6, 1956, c. 1015, §§ 12, 13, 70 Stat. 1071; Dec. 19, 1970, Pub.L. 91-560, § 4, 84 Stat. 1472.

[1] So in original.

§ 2134. Medical therapy, research, and development licenses; limitations

(a) The Commission is authorized to issue licenses to persons applying therefor for utilization facilties for use in medical therapy. In issuing such licenses the Commission is directed to permit the widest amount of effective medical therapy possible with the amount of special nuclear material available for such purposes and to impose the minimum amount of regulation consistent with its obligations under this chapter to promote the common defense and security and to protect the health and safety of the public.

(b) As provided for in subsection (b) or (c) of section 2132 of this title, or where specifically authorized by law, the Commission is authorized to issue licenses under this subsection to persons applying therefor for utilization and production facilities for industrial and commercial purposes. In issuing licenses under this subsection, the Commission shall impose the minimum amount of such regulations and terms of license as will permit the Commission to fulfill its obligations under this chapter.

(c) The Commission is authorized to issue licenses to persons applying therefor for utilization and production facilities useful in the conduct of research and development activities of the types specified in section 2051 of this title and which are not facilities of the type specified in subsection (b) of this section. The Commission is directed to impose only such minimum amount of regulation of the licensee as the Commission finds will permit the Commission to fulfill its obligations under this chapter to promote the common defense and security and to protect the health and safety of the public and will permit the conduct of widespread and diverse research and development.

(d) No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 2153 of this title or except under the provisions of section 2139 of this title. No license may be issued to any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

Aug. 1, 1946, c. 724, § 104, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 937, and amended Dec. 19, 1970, Pub.L. 91-560, § 5, 84 Stat. 1472.

§ 2135. Anti-trust provisions governing licenses; reports to Attorney General

(a) Nothing contained in this chapter shall relieve any person from the operation of sections 1 to 13, 14 to 19, 20, 21, 22 to 27, 41 to 46, and 47 to 58 of Title 15 and sections 52 and 53 of Title 29. In the event a licensee is found by a court of competent jurisdiction, either in an original action in that court or in a proceeding to enforce or review the findings or orders of any Government agency having jurisdiction under the sections cited above, to have violated any of the provisions of such sections in the conduct of the licensed activity, the Commission may suspend, revoke, or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this chapter.

(b) The Commission shall report promptly to the Attorney General any information it may have with respect to any utilization of special nuclear material or atomic energy which appears to violate or to tend toward the violation of any of the foregoing sections, or to restrict free competition in private enterprise.

(c) (1) The Commission shall promptly transmit to the Attorney General a copy of any license application provided for in paragraph (2) of this subsection, and a copy of any written request provided for in paragraph (3) of this subsection; and the Attorney General shall, within a reasonable time, but in no event to exceed 180 days after receiving a copy of such application or written request, render such advice to the Commission as he determines to be appropriate in regard to the finding to be made by the Commission pursuant to paragraph (5) of this subsection. Such advice shall include an explanatory statement as to the reasons or basis therefor.

(2) Paragraph (1) of this subsection shall apply to an application for a license to construct or operate a utilization or production facility under section 2133 of this title: *Provided, however,* That paragraph (1) shall not apply to an application for a license to operate a utilization or production facility for which a construction permit was issued under section 2133 of this title unless the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility.

(3) With respect to any Commission permit for the construction of a utilization or production facility issued pursuant to subsection (b) of section 2134 of this title prior to December 19, 1970, any person who intervened or who sought by timely written notice to the Commission to intervene in the construction permit proceeding for the facility to obtain a determination of antitrust considerations or to advance a jurisdictional basis for such determination shall have

the right, upon a written request to the Commission, to obtain an antitrust review under this section of the application for an operating license. Such written request shall be made within 25 days after the date of initial Commission publication in the Federal Register of notice of the filing of an application for an operating license for the facility or December 19, 1970, whichever is later.

(4) Upon the request of the Attorney General, the Commission shall furnish or cause to be furnished such information as the Attorney General determines to be appropriate for the advice called for in paragraph (1) of this subsection.

(5) Promptly upon receipt of the Attorney General's advice, the Commission shall publish the advice in the Federal Register. Where the Attorney General advises that there may be adverse antitrust aspects and recommends that there be a hearing, the Attorney General or his designee may participate as a party in the proceedings thereafter held by the Commission on such licensing matter in connection with the subject matter of his advice. The Commission shall give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceedings in connection with such subject matter, and shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection (a) of this section.

(6) In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate.

(7) The Commission, with the approval of the Attorney General, may except from any of the requirements of this subsection such classes or types of licenses as the Commission may determine would not significantly affect the applicant's activities under the antitrust laws as specified in subsection (a) of this section.

(8) With respect to any application for a construction permit on file at the time of enactment into law of this subsection, which permit would be for issuance under section 2133 of this title, and with respect to any application for an operating license in connection with which a written request for an antitrust review is made as provided for in paragraph (3), the Commission, after consultation with the Attorney General, may, upon determination that such action is necessary in the public interest to avoid unnecessary delay, establish by rule or order periods for Commission notification and receipt of advice differing from those set forth above and may issue a construction permit or operating license in advance of consideration of and findings with respect to the matters covered in this subsection: *Provided*, That any construction permit or operating license so issued shall contain such conditions as the Commission deems appropriate to assure that any subsequent findings and orders of the Commission with respect to such matters will be given full force and effect.

Aug. 1, 1946, c. 724, § 105, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 938, and amended Aug. 26, 1964, Pub.L. 88–489, § 14, 78 Stat. 606; Dec. 19, 1970, Pub.L. 91-560, § 6, 84 Stat. 1473.

§ 2137. Operators' licenses

The Commission shall—

(a) prescribe uniform conditions for licensing individuals as operators of any of the various classes of production and utilization facilities licensed in this chapter;

(b) determine the qualifications of such individuals;

(c) issue licenses to such individuals in such form as the Commission may prescribe; and

(d) suspend such licenses for violations of any provision of this chapter or any rule or regulation issued thereunder whenever the Commission deems such action desirable.

Aug. 1, 1946, c. 724, § 107, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 939.

§ 2201. General duties of Commission

In the performance of its functions the Commission is authorized to—

Establishment of advisory boards

(a) establish advisory boards to advise with and make recommendations to the Commission on legislation, policies, administration, research, and other matters, provided that the Commis-

sion issues regulations setting forth the scope, procedure, and limitations of the authority of each such board;

Standards governing use and possession of material

(b) establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary to desirable to promote the common defense and security or to protect health or to minimize danger to life or property;

Studies and investigations

(c) make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter, or in the administration or enforcement of this chapter, or any regulations or orders issued thereunder. For such purposes the Commission is authorized to administer oaths and affirmations, and by subpena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place. Witnesses subpenaed under this subsection shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States;

Employment of personnel

(d) appoint and fix the compensation of such officers and employees as may be necessary to carry out the functions of the Commission. Such officers and employees shall be appointed in accordance with the civil-service laws and their compensation fixed in accordance with chapter 51 and subchapter III of chapter 53 of Title 5, except that, to the extent the Commission deems such action necessary to the discharge of its responsibilities, personnel may be employed and their compensation fixed without regard to such laws: *Provided, however,* That no officer or employee (except such officers and employees whose compensation is fixed by law, and scientific and technical personnel up to a limit of the highest rate of grade 18 of the General Schedule) whose position would be subject to chapter 51 and subchapter III of chapter 53 of Title 5, if such provisions were applicable to such position, shall be paid a salary at a rate in excess of the rate payable under such provisions for positions of equivalent difficulty or responsibility. Such rates of compensation may be adopted by the Commission as may be authorized by chapter 51 and subchapter III of chapter 53 of Title 5, as of the same date such rates are authorized for positions subject to such provisions. The Commission shall make adequate provision for administrative review of any determination to dismiss any employee;

Acquisition of material, property, etc.; negotiation of commercial leases

(e) acquire such material, property, equipment, and facilities, establish or construct such buildings and facilities, and modify such buildings and facilities from time to time, as it may deem necessary, and construct, acquire, provide, or arrange for such facilities and services (at project sites where such facilities and services are not available) for the housing, health, safety, welfare, and recreation of personnel employed by the Commission as it may deem necessary, subject to the provisions of section 2224 of this title: *Provided, however,* That in the communities owned by the Commission, the Commission is authorized to grant privileges, leases and permits upon adjusted terms which (at the time of the initial grant of any privilege grant, lease, or permit, or renewal thereof, or in order to avoid inequities or undue hardship prior to the sale by the United States of property affected by such grant) are fair and reasonable to responsible persons to operate commercial businesses without advertising and without advertising[1] and without securing competitive bids, but taking into consideration, in addition to the price, and among other things (1) the quality and type of services required by the residents of the community, (2) the experience of each concession applicant in the community and its surrounding area, (3) the ability of the concession applicant to meet the needs of the community, and (4) the contribution the concession applicant has made or will make to the other activities and general welfare of the community;

Utilization of other Federal agencies

(f) with the consent of the agency concerned, utilize or employ the services or personnel of any Government agency or any State or local government, or voluntary or uncompensated personnel, to perform such functions on its behalf as may appear desirable;

Acquisition of real and personal property

(g) acquire, purchase, lease, and hold real and personal property, including patents, as agent of and on behalf of the United States, subject to the provisions of section 2224 of this title, and to sell, lease, grant, and dispose of such real and personal property as provided in this chapter;

Consideration of license applications

(h) consider in a single application one or more of the activities for which a license is required by this chapter, combine in a single license one or more of such activities, and permit the applicant or licensee to incorporate by reference pertinent information already filed with the Commission;

Regulations governing Restricted Data

(i) prescribe such regulations or orders as it may deem necessary (1) to protect Restricted Data received by any person in connection with any activity authorized pursuant to this chapter, (2) to guard against the loss or diversion of any special nuclear material acquired by any person pursuant to section 2073 of this title or produced by any person in connection with any activity authorized pursuant to this chapter, and to prevent any use or disposition thereof which the Commission may determine to be inimical to the common defense and security, and (3) to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property;

Disposition of surplus materials

(j) without regard to the provisions of the Federal Property and Administrative Services Act of 1949, as amended, except section 488 of Title 40, or any other law, make such disposition as it may deem desirable of (1) radioactive materials, and (2) any other property, the special disposition of which is, in the opinion of the Commission, in the interest of the national security: *Provided, however*, That the property furnished to licensees in accordance with the provisions of subsection (m) of this section shall not be deemed to be property disposed of by the Commission pursuant to this subsection;

Carrying of firearms

(k) authorize such of its members, officers, and employees as it deems necessary in the interest of the common defense and security to carry firearms while in the discharge of their official duties. The Commission may also authorize such of those employees of its contractors engaged in the protection of property owned by the United States and located at facilities owned by or contracted to the United States as it deems necessary in the interests of the common defense and security to carry firearms while in the discharge of their official duties;

(*l*) Repealed. Pub.L. 87-456, Title III, § 303(c), May 24, 1962, 76 Stat. 78.

Agreements regarding production

(m) enter into agreements with persons licensed under section 2133, 2134, 2073(a)(4), or 2093(a)(4) of this title for such periods of time as the Commission may deem necessary or desirable (1) to provide for the processing, fabricating, separating, or refining in facilities owned by the Commission of source, byproduct, or other material or special nuclear material owned by or made available to such licensees and which is utilized or produced in the conduct of the licensed activity, and (2) to sell, lease, or otherwise make available to such licensees such quantities of source or byproduct material, and other material not defined as special nuclear material pursuant to this chapter, as may be necessary for the conduct of the licensed activity: *Provided, however*, That any such agreement may be canceled by the licensee at any time upon payment of such reasonable cancellation charges as may be agreed upon by the licensee and the Commission: *And provided further*, That the Commission shall establish prices to be paid by licensees for material or services to be furnished by the Commission pursuant to this subsection, which prices shall be established on such a nondiscriminatory basis as, in the opinion of the Commission, will provide reasonable compensation to the Government for such material or services and will not discourage the development of sources of supply independent of the Commission;

Delegation of functions

(n) delegate to the General Manager or other officers of the Commission any of those functions assigned to it under this chapter except those specified in sections 2071, 2077(b), 2091, 2138, 2153, 2165(b) of this title (with respect to the determina-

tion of those persons to whom the Commission may reveal Restricted Data in the national interest), 2165(f) of this title and subsection (a) of this section;

Reports

(o) require by rule, regulation, or order, such reports, and the keeping of such records with respect to, and to provide for such inspections of, activities and studies of types specified in section 2051 of this title and of activities under licenses issued pursuant to sections 2073, 2093, 2111, 2133, and 2134 of this title, as may be necessary to effectuate the purposes of this chapter, including section 2135 of this title; and

Rules and regulations

(p) make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this chapter.

Easements for rights-of-way

(q) The Commission is authorized and empowered, under such terms and conditions as are deemed advisable by it, to grant easements for rights-of-way over, across, in, and upon acquired lands under its jurisdiction and control, and public lands permanently withdrawn or reserved for the use of the Commission, to any State, political subdivision thereof, or municipality, or to any individual, partnership, or corporation of any State, Territory, or possession of the United States, for (a) railroad tracks; (b) oil pipe lines; (c) substations for electric power transmission lines, telephone lines, and telegraph lines, and pumping stations for gas, water, sewer, and oil pipe lines; (d) canals; (e) ditches; (f) flumes; (g) tunnels; (h) dams and reservoirs in connection with fish and wildlife programs, fish hatcheries, and other fish-cultural improvements; (i) roads and streets; and (j) for any other purpose or purposes deemed advisable by the Commission: *Provided*, That such rights-of-way shall be granted only upon a finding by the Commission that the same will not be incompatible with the public interest: *Provided further*, That such rights-of-way shall not include any more land than is reasonably necessary for the purpose for which granted: *And provided further*, That all or any part of such rights-of-way may be annulled and forfeited by the Commission for failure to comply with the terms and conditions of any grant hereunder or for nonuse for a period of two consecutive years or abandonment of rights granted under authority hereof. Copies of all instruments granting easements over public lands pursuant to this section shall be furnished to the Secretary of the Interior.

Sale of utilities and related services

(r) Under such regulations and for such periods and at such prices the Commission may prescribe, the Commission may sell or contract to sell to purchasers within Commission-owned communities or in the immediate vicinity of the Commission community, as the case may be, any of the following utilities and related services, if it is determined that they are not available from another local source and that the sale is in the interest of the national defense or in the public interest:

(1) Electric power.

(2) Steam.

(3) Compressed air.

(4) Water.

(5) Sewage and garbage disposal.

(6) Natural, manufactured, or mixed gas.

(7) Ice.

(8) Mechanical refrigeration.

(9) Telephone service.

Proceeds of sales under this subsection shall be credited to the appropriation currently available for the supply of that utility or service. To meet local needs the Commission may make minor expansions and extensions of any distributing system or facility within or in the immediate vicinity of a Commission-owned community through which a utility or service is furnished under this subsection.

Succession of authority

(s) establish a plan for a succession of authority which will assure the continuity of direction of the Commission's operations in the event of a national disaster due to enemy activity. Notwithstanding any other provision of this chapter, the person or persons succeeding to command in the event of disaster in accordance with the plan established pursuant to this subsection shall be vested with all of the authority of the Commission: *Provided*, That any such succession to authority, and ves-

ting of authority shall be effective only in the event and as long as a quorum of three or more members of the Commission is unable to convene and exercise direction during the disaster period: *Provided further*, That the disaster period includes the period when attack on the United States is imminent and the post-attack period necessary to reestablish normal lines of command;

Contracts

(t) enter into contracts for the processing, fabricating, separating, or refining in facilities owned by the Commission of source, byproduct or other material, or special nuclear material, in accordance with and within the period of an agreement for cooperation while comparable services are available to persons licensed under section 2133 or 2134 of this title: *Provided*, That the prices for services under such contracts shall be no less than the prices currently charged by the Commission pursuant to subsection (m) of this section;

Additional contracts; guiding principles; appropriations

(u)(1) enter into contracts for such periods of time as the Commission may deem necessary or desirable, but not to exceed five years from the date of execution of the contract, for the purchase or acquisition of reactor services or services related to or required by the operation of reactors;

(2)(A) enter into contracts for such periods of time as the Commission may deem necessary or desirable for the purchase or acquisition of any supplies, equipment, materials, or services required by the Commission whenever the Commission determines that: (i) it is advantageous to the Government to make such purchase or acquisition from commercial sources; (ii) the furnishing of such supplies, equipment, materials, or services will require the construction or acquisition of special facilities by the vendors or suppliers thereof; (iii) the amortization chargeable to the Commission constitutes an appreciable portion of the cost of contract performance, excluding cost of materials; and (iv) the contract for such period is more advantageous to the Government than a similar contract not executed under the authority of this subsection. Such contracts shall be entered into for periods not to exceed five years each from the date of initial delivery of such supplies, equipment, materials, or services or ten years from the date of execution of the contracts excluding periods of renewal under option.

(B) In entering into such contracts the Commission shall be guided by the following principles: (i) the percentage of the total cost of special facilities devoted to contract performance and chargeable to the Commission should not exceed the ratio between the period of contract deliveries and the anticipated useful life of such special facilities; (ii) the desirability of obtaining options to renew the contract for reasonable periods at prices not to include charges for special facilities already amortized; and (iii) the desirability of reserving in the Commission the right to take title to the special facilities under appropriate circumstances; and

(3) include in contracts made under this subsection provisions which limit the obligation of funds to estimated annual deliveries and services and the unamortized balance of such amounts due for special facilities as the parties shall agree is chargeable to the performance of the contract. Any appropriation available at the time of termination or thereafter made available to the Commission for operating expenses shall be available for payment of such costs which may arise from termination as the contract may provide. The term "special facilities" as used in this subsection means any land and any depreciable buildings, structures, utilities, machinery, equipment, and fixtures necessary for the production or furnishing of such supplies, equipment, materials, or services and not available to the vendors or suppliers for the performance of the contract.

Contracts for production or enrichment of special nuclear material; domestic licensees; other nations; prices; materials of foreign origin; criteria for availability of services under this subsection; Congressional review

(v)(A) enter into contracts with persons licensed under sections 2073, 2093, 2133 or 2134 of this title for such periods of time as the Commission may deem necessary or desirable to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission; and

(B) enter into contracts to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission in accordance with and within the period of an agreement for cooperation arranged pursuant to section 2153 of this title while comparable services are made available pursuant to paragraph (A) of this subsection: *Provided*, That (i) prices for services under paragraph (A) of this

subsection shall be established on a nondiscriminatory basis; (ii) prices for services under paragraph (B) of this subsection shall be no less than prices under paragraph (A) of this subsection; and (iii) any prices established under this subsection shall be on a basis of recovery of the Government's costs over a reasonable period of time: *And provided further*, That the Commission, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. The Commission shall establish criteria in writing setting forth the terms and conditions under which services provided under this subsection shall be made available including the extent to which such services will be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States: *Provided*, That before the Commission establishes such criteria, the proposed criteria shall be submitted to the Joint Committee, and a period of forty-five days shall elapse while Congress is in session (in computing the forty-five days there shall be excluded the days in which either House is not in session because of adjournment for more than three days) unless the Joint Committee by resolution in writing waives the conditions of, or all or any portion of, such forty-five-day period.

License fees for nuclear power reactors

(w) prescribe and collect from any other Government agency, which applies for or is issued a license for a utilization facility designed to produce electrical or heat energy pursuant to section 2133 or 2134(b) of this title, any fee, charge, or price which it may require, in accordance with the provisions of section 483a of Title 31 or any other law, of applicants for, or holders of, such licenses.

Aug. 1, 1946, c. 724, § 161, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 948, and amended July 14, 1956, c. 608, 70 Stat. 553; Aug. 6, 1956, c. 1015, § 4, 70 Stat. 1069; Aug. 21, 1957, Pub.L. 85-162, Title II, §§ 201, 204, 71 Stat. 410; Sept. 4, 1957, Pub.L. 85-287, § 4, 71 Stat. 613; July 7, 1958, Pub.L. 85-507, § 21(b)(1), 72 Stat. 337; Aug. 19, 1958, Pub.L. 85-681, §§ 6, 7, 72 Stat. 633; Sept. 21, 1959, Pub.L. 86-300, § 1, 73 Stat. 574; Sept. 6, 1961, Pub.L. 87-206, § 13, 75 Stat. 478; May 24, 1962, Pub.L. 87-456, Title III, § 303(c), 76 Stat. 78; Aug. 29, 1962, Pub.L. 87-615, § 12, 76 Stat. 411; Oct. 11, 1962, Pub.L. 87-793, § 1001(g), 76 Stat. 864; Aug. 26, 1964, Pub.L. 88-489, § 16, 78 Stat. 606; Dec. 14, 1967, Pub.L. 90-190, § 11, 81 Stat. 578; Oct. 15, 1970, Pub.L. 91-452, Title II, § 237, 84 Stat. 930; Dec. 19, 1970, Pub.L. 91-560, §§ 7, 8, 84 Stat. 1474; June 16, 1972, Pub.L. 92-314, Title III, § 301, 86 Stat. 227.

[1] So in original.

§ 2233. Terms of licenses

Each license shall be in such form and contain such terms and conditions as the Commission may, by rule or regulation, prescribe to effectuate the provisions of this chapter, including the following provisions:

(a) Repealed. Pub.L. 88-489, § 18, Aug. 26, 1964, 78 Stat. 607.

(b) No right to the special nuclear material shall be conferred by the license except as defined by the license.

(c) Neither the license nor any right under the license shall be assigned or otherwise transferred in violation of the provisions of this chapter.

(d) Every license issued under this chapter shall be subject to the right of recapture or control reserved by section 2138 of this title, and to all of the other provisions of this chapter, now or hereafter in effect and to all valid rules and regulations of the Commission.

Aug. 1, 1946, c. 724, § 183, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 954, and amended Aug. 26, 1964, Pub.L. 88-489, § 18, 78 Stat. 607.

§ 2234. Inalienability of licenses

No license granted hereunder and no right to utilize or produce special nuclear material granted hereby shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this chapter, and shall give its consent in writing. The Commission may give such consent to the creation of a mortgage, pledge, or other lien upon any facility or special nuclear material, owned or thereafter acquired by a licensee, or upon any leasehold or

other interest in such facility, and the rights of the creditors so secured may thereafter be enforced by any court subject to rules and regulations established by the Commission to protect public health and safety and promote the common defense and security.

Aug. 1, 1946, c. 724, § 184, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 954, and amended Aug. 26, 1964, Pub.L. 88-489, § 19, 78 Stat. 607.

§ 2235. Construction permits

All applicants for licenses to construct or modify production or utilization facilities shall, if the application is otherwise acceptable to the Commission, be initially granted a construction permit. The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date. Upon the completion of the construction or modification of the facility, upon the filing of any additional information needed to bring the original application up to date, and upon finding that the facility authorized has been constructed and will operate in conformity with the application as amended and in conformity with the provisions of this chapter and of the rules and regulations of the Commission, and in the absence of any good cause being shown to the Commission why the granting of a license would not be in accordance with the provisions of this chapter, the Commission shall thereupon issue a license to the applicant. For all other purposes of this chapter, a construction permit is deemed to be a "license".

Aug. 1, 1946, c. 724, § 185, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 955.

§ 2236. Revocation of licenses—False applications; failure of performance

(a) Any license may be revoked for any material false statement in the application or any statement of fact required under section 2232 of this title, or because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant

a license on an original application, or for failure to construct or operate a facility in accordance with the terms of the construction permit or license or the technical specifications in the application, or for violation of, or failure to observe any of the terms and provisions of this chapter or of any regulation of the Commission.

Procedure

(b) The Commission shall follow the provisions of section 9(b) of the Administrative Procedure Act in revoking any license.

Repossession of material

(c) Upon revocation of the license, the Commission may immediately retake possession of all special nuclear material held by the licensee. In cases found by the Commission to be of extreme importance to the national defense and security or to the health and safety of the public, the Commission may recapture any special nuclear material held by the licensee or may enter upon and operate the facility prior to any of the procedures provided under the Administrative Procedure Act. Just compensation shall be paid for the use of the facility.

Aug. 1, 1946, c. 724, § 186, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 955.

§ 2237. Modification of license

The terms and conditions of all licenses shall be subject to amendment, revision, or modification, by reason of amendments of this chapter or by reason of rules and regulations issued in accordance with the terms of this chapter.

Aug. 1, 1946, c. 724, § 187, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 955.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of this Petition for Writ of Certiorari by mail or airmail, as appropriate, in accordance with Rules 31 and 33 of the Supreme Court of the United States on the Solicitor General and all parties before the Court of Appeals for the District of Columbia, including the respondent Nuclear Regulatory Commission and the United States Department of Justice.

ROBERT A. JABLON

June 21, 1979

No. 78-1894

In the Supreme Court of the United States

OCTOBER TERM, 1978

FORT PIERCE UTILITIES AUTHORITY OF THE CITY OF FORT PIERCE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND THE NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1894

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-31) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1979. The petition for a writ of certiorari was filed on June 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in enacting the 1970 amendments to the Atomic Energy Act, Congress intended to exempt nuclear power plants already holding research and development

licenses from post-licensing antitrust review by the Nuclear Regulatory Commission.

STATUTES INVOLVED

The relevant sections of the Atomic Energy Act, 42 U.S.C. 2132-2135, and 42 U.S.C. 2236, are set forth at Pet. App. A-32 to A-36.

STATEMENT

Florida Power & Light Co. ("FPL"), operator of the three nuclear power plants at issue here, received a construction permit for each of the plants pursuant to Section 104(b) of the Atomic Energy Act, 42 U.S.C. 2134(b), before the Act was amended in 1970.[1] Operating licenses for the plants were issued pursuant to Section 104(b) in 1972, 1973, and 1976. No one requested, nor did the Nuclear Regulatory Commission[2] conduct, an antitrust inquiry in connection with the licensing of the three power plants (Pet. App. A-4 to A-5).

The first request for antitrust review was made on August 6, 1976 when petitioners, the Florida Municipal Utilities Association and a group of Florida municipalities and municipal electric systems ("Florida Cities"), sought to intervene on antitrust grounds in a construction permit proceeding for another FPL plant. They joined with that petition a request for an antitrust hearing on the three plants already holding operating licenses. An Atomic

[1]Construction permits were issued for two of the plants on April 29, 1967, and for the third plant on July 1, 1970 (Pet. App. A-4). The 1970 amendments to the Act became effective December 19, 1970.

[2]The Nuclear Regulatory Commission succeeded to the licensing and regulatory functions of the Atomic Energy Commission on January 15, 1975. 42 U.S.C. 5801, 5841(f). We use "Commission" to refer either to the AEC or the NRC as the context suggests.

Safety and Licensing Board denied the request (Pet. App. A-6).

On August 23, 1977 the Commission's Appeal Board affirmed, holding that Commission post-licensing antitrust review of Section 104(b) licensed power plants was unavailable under the statute, as amended (Pet. App. A-41 to A-48). The Board reasoned that in the 1970 amendments Congress had expressly excluded from the prelicensing antitrust review provisions of Section 105(c) those power reactors which had been licensed under Section 104(b) for research and development prior to the amendments (Pet. App. A-44). The Board also found that review premised on any other section of the Atomic Energy Act was unavailable under the Commission's ruling in *Houston Lighting & Power Company*, 5 N.R.C. 1303 (Pet. App. A-51 to A-81), where the Commission held that Section 105 encompasses the totality of the Commission's antitrust hearing responsibilities. In any event, the Board found that the provisions of Section 186(a) of the Act, 42 U.S.C. 2236(a), upon which Florida Cities relied, were inapplicable. That section empowers the Commission to revoke a license on any ground that would warrant the Commission to refuse to grant the original license. The Board held that Section 186(a) could not serve as a source of antitrust review authority here because Section 104(b) licenses had by statute never been subject to prelicensing antitrust review (Pet. App. A-45).

The Commission declined to review the Appeal Board's decision, but directed that the allegations contained in Florida Cities' petition be referred to the Department of Justice for investigation and possible enforcement action (Pet. App. A-49 to A-50).

The court of appeals affirmed the Appeal Board's decision. In doing so, the court specifically reserved the

broad question of whether Section 105 is the Commission's exclusive grant of antitrust authority over all types of operating licenses for nuclear facilities (Pet. App. A-30 n.17). Instead, it based its decision on the narrow ground (Pet. App. A-30)

> that even assuming that section 186(a) vests the Commission with antitrust authority over operating licenses other than that provided in section 105, it does not, by its own terms, authorize postlicensing antitrust review of the section 104(b) operating licenses at issue here. This decision turns on our view that section 186(a) is not a plenary grant of authority to revoke a license, but rather a limited grant of such authority applicable only where conditions are revealed that would warrant the Commission, under current licensing standards for the type of license in question, to refuse to grant a license on an original application. In the instant case, involving section 104(b) operating licenses which are exempt under current licensing standards from prelicensing antitrust review, Florida Cities are not entitled to postlicensing antitrust review under section 186(a) inasmuch as their allegations of antitrust violations, even if true, would not warrant the Commission to refuse to grant a license on an original application.[3]

[3]The court of appeals noted that this interpretation of the Atomic Energy Act did not, as Florida Cities had asserted (Pet. 11; Pet. App. A-31), give FPL carte blanche to use its nuclear power plants contrary to the antitrust laws (Pet. App. A-31):

> Section 105(a) not only provides that nothing in the Act preempts the normal operation of the antitrust laws, but also vests the Commission with authority to revoke or modify FP&L's operating licenses in the event that a court finds that FP&L has violated those laws in the course of licensed activity. Moreover, the Commission, acting pursuant to section 105(b), has already forwarded Florida Cities' antitrust allegations to the Justice Department.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant review by this Court. The Atomic Energy Act generally provides for two types of construction permits and operating licenses for nuclear facilities: (1) those issued under Section 104(b), known as research and development licenses, which are subject to minimum regulations, and (2) those issued under Section 103, known as "commercial" licenses, which are subject to full-scale Commission regulation. See 42 U.S.C. 2132-2134.

The 1970 amendments to the Atomic Energy Act were enacted to clarify the Commission's antitrust review obligations in licensing matters. Prior to their enactment, the Commission had never undertaken antitrust review of any nuclear power plant license application because all licenses had been issued under Section 104(b), the research and development licensing provisions of the Act. Section 104(b), the Commission and the courts had held, did not authorize Commission antitrust review. *Cities of Statesville* v. *AEC*, 441 F. 2d 962, 973 (D.C. Cir. 1969) (en banc). Under the pre-1970 scheme, any antitrust review of a license application had to await a Commission finding that the power plant sought to be built or operated was of "practical value" for industrial or commercial purposes.[4] Such a finding would require issuance of a commercial license under Section 103, 42 U.S.C. 2133, which in turn requires Commission antitrust review.[5] Section 105(c), 42 U.S.C. 2135(c); *Cities of Statesville* v. *AEC*, *supra*, 441 F. 2d at 974.

[4]See former Section 102, 42 U.S.C. (1964 ed.) 2132; *Cities of Statesville*, *supra*.

[5]Plants that had received construction permits and operating licenses before 1970 under Section 104(b) did in fact sell power commercially, but they were not deemed for regulatory purposes to

The statutory scheme Congress adopted in 1970 eliminated the requirement of a practical value finding. Now, with certain limited exceptions, all facilities must be licensed under Section 103 and, hence, screened for any adverse antitrust impact. After due consideration, however, Congress specifically exempted from such antitrust review any previously issued Section 104(b) licenses unless (as is not the case here) there had been a request for intervention on antitrust grounds at the construction permit stage. Section 102(b), 105(c)(3), 42 U.S.C. 2132(b), 2135(c)(3).[6]

The court of appeals thus correctly found (and petitioners do not contend otherwise) that, in enacting the 1970 amendments to the Atomic Energy Act, Congress specifically grandfathered from pre-licensing antitrust review the category of Section 104(b) licenses at issue here (Pet. App. A-13 to A-14, A-21). Since the Commission is not now, and never has been, empowered to refuse a Section 104(b) license based on antitrust considerations, it follows that the Commission's general regulatory powers to bring earlier licensees up to current standards for their class of license do not authorize

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be "commercial" plants that had to be licensed under Section 103 because the Commission had never made the "practical value" determination required by Section 103. As discussed in the text, the 1970 amendments changed that system.

[6]Although the court of appeals in *Cities of Statesville*, *supra*, had held that under the pre-1970 statutory scheme the Commission had no authority to consider antitrust allegations in licensing proceedings under Section 104(b), the proviso in the 1970 amendments now codified in 42 U.S.C. 2135(c)(3) was designed to permit parties in the situation of the petitioners in *Statesville*, who had raised antitrust objections at the construction permit stage before 1970, to renew those objections and require the Commission to consider those claims at the post-1970 operating license stage.

antitrust review of these particular power plants (Pet. 8, 13-14 & n.14). It is equally apparent that Section 186(a) does not provide the post-licensing review authority sought by petitioners. Section 186(a) authorizes the Commission to revoke a license "because of conditions revealed * * * which would warrant the Commission to refuse to grant a license on an original application * * *." 42 U.S.C. 2236(a). If a "condition revealed" would not warrant the Commission's refusing a license in the first instance, it cannot be the basis under Section 186(a) for revocation of a license.

Therefore, as the court of appeals observed (Pet. App. A-22), since the original license applications were expressly exempt from antitrust review, "it would be anomalous to interpret section 186(a) as authorizing postlicensing antitrust review under section 103 standards of the section 104(b) licenses at issue here * * *."[7] The decision of the court of appeals is thus wholly consistent

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[7]Petitioners mischaracterize the court of appeals' decision in *Cities of Statesville*, *supra*, when they claim that the court has "ignore[d] * * * its own *Statesville* decision" and that Congress must have relied on and "endorse[d] the *Statesville* determination that under §186 'all' licenses are subject to post-licensing antitrust authority" (Pet. 20-21).

Cities of Statesville involved the Commission's prelicensing antitrust responsibilities. The questions presented were (1) whether the Commission had properly relied on Section 104(b) rather than Section 103 to issue the construction licenses at issue, and (2) if so, whether the Commission had correctly concluded that Section 104(b) gave it no antitrust review authority. 441 F. 2d at 969. The court upheld the Commission on both grounds. It then went on, in dicta, to discuss the Commission's antitrust responsibilities under other provisions of the Act. The court viewed the construction license proceeding before it as the first step in the statutory scheme. *Id.* at 974. The second step would be securing an operating license. The court strongly suggested that at that point the Commission carefully consider granting an operating license under Section 103, rather than 104(b), if the commercial feasibility of the facility warranted it. And in that case, the court admonished, the

with both the language and legislative history (Pet. App. A-19 to A-24) of the 1970 amendments.[8]

Finally, the court's decision does not have the broad implications petitioners suggest (Pet. 10). It deals, rather, with the narrow determination, explicitly addressed and resolved by Congress, that facilities that had been licensed under Section 104(b) prior to December 1970, and which had never been challenged on antitrust grounds, should not be subject to Commission antitrust review in later proceedings. Furthermore, there is no basis for petitioners' suggestion (Pet. 11) that the decision below leaves operators of such facilities free to violate the antitrust laws. As the court of appeals noted (Pet. App. A-31), aggrieved parties are always free to file an antitrust

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Commission must consider antitrust impact. The court then went on to discuss what it called the "final step" in the Commission's oversight functions. It was in the context, therefore, of discussing Section 103 that the court observed: "[U]nder section 186(a) * * * the Commission has the power to revoke any type of license it has issued when there is 'a violation of, or failure to observe any of the terms and provisions' of the Act" (*id.* at 974). Contrary to petitioners' claim, this statement was plainly not an endorsement of Section 186(a) as authority to revoke a Section 104(b) license on antitrust grounds. And petitioners point to nothing in the legislative history of the 1970 amendments which suggests that Congress viewed the decision as such an endorsement. To the contrary, as petitioners and the court of appeals agree, the 1970 amendments focused on the Commission's licensing functions under Section 105, and were, at least in part, an express refutation of the *Statesville* rationale (Pet. 21; Pet. App. A-14).

[8]The Commission's Appeal Board had reached the same conclusion (see Pet. App. A-45 and page 3, *supra*). There is therefore no merit to petitioners' contention that the court's decision "is premised upon grounds not even relied upon by the agency itself" (Pet. 27; see also Pet. 4).

complaint in the district courts and obtain a judicial determination of their claims.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1979

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[9]Indeed, as petitioners note (Pet. 11-12), there has been such an adjudication respecting the activities of FPL (*Gainesville Utilities Department* v. *Florida Power and Light Co.*, 573 F. 2d 292 (5th Cir.), cert. denied, No. 78-476 (Nov. 13, 1978)), and the Commission has under advisement motions asking it to conduct an antitrust inquiry under Section 105(a) of the Act, 42 U.S.C. 2135(a).

DOJ-1979-08

IN THE

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OCTOBER TERM, 1978

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Petitioners,

v.

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Respondents,

and

FLORIDA POWER & LIGHT COMPANY

Intervenor-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR FLORIDA POWER & LIGHT COMPANY IN OPPOSITION

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BRIEF FOR FLORIDA POWER & LIGHT COMPANY IN OPPOSITION

Florida Power & Light Company (FPL), an intervenor in support of respondent Nuclear Regulatory Commission (Commission or NRC), below, submits this brief in opposition to the Petition for Writ of Certiorari[1] to review the judgment entered in this case on March 23, 1979.

STATUTES INVOLVED

FPL does not adopt Florida Cities' characterization of Section 186 of the Atomic Energy Act of 1954 (Act), 42 U.S.C. §2236, as the "principle [*sic*] statute involved" (Pet., 4). The decision below was also based on Sections 102b and 105 of the Act, 42 U.S.C. § 2132(b), §2135, which are set forth in the Appendix to the Petition at A-85 and A-88 through A-91, respectively.

[1] Citations to the Petition are designated as "Pet.," followed by the page number. The Petition contains an Appendix, which consists of the text of relevant decisions below and applicable statutes. The Appendix is numbered consecutively, with each page number preceeded by an "A-". This Appendix begins with the D.C. Circuit's decision below, which, as of the filing date, has not been published. Since the slip opinion is numbered the same as the version appearing in the Appendix (with the exception of the "A-") citations to the Court of Appeals decision will reference only the Appendix.

QUESTION PRESENTED

Did the Court of Appeals correctly affirm the NRC's determination that the NRC could not invoke Section 186a of the Act to apply the antitrust review standards of Section 105c to earlier issued licenses, which, because of express Congressional exemption, were not subject to the antitrust review provisions of Section 105c when the applications were originally filed?

STATEMENT OF THE CASE

Respondent FPL is an investor-owned public utility which generates, transmits, and distributes electricity to its customers within the state of Florida. FPL's resources for the generation of electricity include three nuclear plants which are licensed to operate by the NRC.

Petitioners, Florida Cities,[2] seek review of a decision by the Court of Appeals for the D.C. Circuit upholding the NRC's denial of Florida Cities' requests to initiate antitrust proceedings to modify, suspend, or revoke the operating licenses that FPL holds for its currently operating nuclear plants.

All of the authorizations for construction of these operating plants were issued pursuant to Section 104b of the Act, 42 U.S.C. §2134(b). As it read prior to amendment in 1970, that section authorized issuance of licenses for "research and development" facilities, as contrasted with Section 103, 42 U.S.C. §2133(a), which applies to licenses for "commercial" facilities. One difference between the two provisions is that an

[2] The individual Florida Cities ("Cities") are listed at Pet., 5, n.2.

antitrust review, pursuant to Section 105c, must precede issuance of a commercial (Section 103) license, while no such review attends issuance of a "research and development" (Section 104b) license. Prior to 1970, the Act required that licenses for power reactors be issued under Section 104b until the Commission made a finding that nuclear generating facilities had "practical value."[3] The Commission's failure to make the "practical value" finding, and its resulting practice of continuing to license power reactors under Section 104b without antitrust review, was challenged unsuccessfully in *Cities of Statesville, et al.* v. *Atomic Energy Commission*, 441 F.2d 962 (D.C. Cir. 1969) (en banc).

Congress in 1970 amended the Act[4] to eliminate the requirement for a finding of practical value and to require that, in the future, licenses for power reactors be issued under Section 103 after an antitrust review. However, the 1970 amendments dealt differently with construction permits which had already been issued under Section 104b, including FPL's three plants in issue here.

Licensing of nuclear facilities is a two step process under the Act. First, the Commission issues a construction permit, and, later, after it finds, among other things, that the facility has been properly constructed and can be operated consistent with the public safety, the Commission issues an operating

[3] Section 102 of the Act, 42 U.S.C. §2132, substantially amended in 1970 as described at p.5, *infra*.

[4] P.L. 91-560, 84 Stat. 1473.

license.[5] The *Statesville* court had suggested that, once the "practical value" hurdle was removed, construction permits issued under Section 104b would be converted to "commercial" (Section 103) operating licenses, and that an antitrust review in connection with issuance of those operating licenses would be appropriate under the Act as it stood in 1969. In 1970, Congress focused specifically upon this suggestion and decided not to require any such conversion, but to permit the holders of construction permits under Section 104b to receive operating licenses under the same section without any antitrust review under Section 105c.[6] FPL's three operating plants all received operating licenses under Section 104b.[7]

On August 6, 1976, some three to four years after issuance of the operating licenses for the Turkey Point units and five months after issuance of the St. Lucie Plant, Unit No. 1 operating license, the Cities first made antitrust allegations to the NRC in the form of a petition for leave to intervene and request for an antitrust hearing. Cities requested, principally on the

[5] *See*, Sections 103d and 185 of the Act, 42 U.S.C. §§2133(d), 2235. *See also Power Reactor Development Co.* v. *International Union*, 367 U.S. 396 (1961).

[6] See Section 102b, 42 U.S.C. §2132(b). However, antitrust review of Section 104b operating licenses is permitted in certain cases where intervention on antitrust grounds had been sought prior to the enactment of the 1970 Amendments. Act, Section 105c (3), 42 U.S.C. § 2135(c)(3). This exception is not pertinent here.

[7] Turkey Point Unit No. 3 received its license on July 19, 1972; Turkey Point Unit No. 4 was licensed on April 10, 1973; St. Lucie Unit No. 1 was licensed on March 1, 1976.

basis of Section 186a of the Act,[8] that the NRC commence a proceeding to determine whether the operating licenses issued under section 104b of the Act for FPL's operating plants should be "revoked or modified" on the antitrust grounds.[9] FPL has categorically denied the allegations that a situation inconsistent with the antitrust law exists with respect to any of FPL's proposed or operating nuclear plants. In addition, FPL argued with respect to the operating plants which are in issue here that the NRC lacks jurisdiction to convene an antitrust proceeding because: (1) the NRC's antitrust review authority exists in the context of its licensing proceedings, and does not extend to convening proceedings to enforce the antitrust laws against holders of outstanding licenses; and (2) even if the NRC possesses continuing antitrust review authority, such authority cannot be applied to licenses which Congress has expressly exempted from the Act's antitrust review provisions.

The NRC denied the Cities' request to convene antitrust proceedings with respect to FPL's operating plants. The operative decisions are an opinion of the

[8] Section 186a is a general provision of the Act, which was part of the original 1954 enactment. It provides, in pertinent part, that the NRC may revoke a license "... because of conditions ... which would warrant the commission to refuse to grant a license on an original application...."

[9] In addition, Cities' August 6, 1976, filing requested late intervention and an antitrust hearing with respect to FPL's St. Lucie Plant, Unit No. 2, which application was filed under Section 103 of the Act. The Commission granted the request, which was not in issue before the D.C. Circuit. That matter is separately pending before the Commission in a proceeding entitled *In re Florida Power & Light Company* (St. Lucie Plant, Unit No. 2), Docket No. 50-389A. The Cities' substantive antitrust allegations are being considered in an antitrust hearing in that docket.

NRC's Appeal Board in ALAB-428, 6 NRC 221 (1977) (Pet., A-41)[10] and a letter by the NRC's Director of Nuclear Reactor Regulation, dated September 9, 1977, denying, in reliance on ALAB-428, the Cities' request for issuance of an order requiring FPL to show cause why its licenses for the operating plants should not be revoked or modified (Pet., A-39).

In ALAB-428, the Appeal Board concluded, on two independent grounds, that the Commission lacked jurisdiction to initiate the requested antitrust proceedings. It found, based on the Commission's earlier *South Texas* decision,[11] that NRC licensing authority over antitrust matters "does not extend over the full 40-year term of the operating license but ends at its inception" (Pet., A-46). The second, independent ground for the Appeal Board's conclusion was that the antitrust review provisions of Section 105c do not apply to licenses, such as are involved here, issued pursuant to Section 104b of the Act (Pet., A-44-45). The Appeal Board emphasized that when the 1970 amendments were enacted, "Congress had considered this class [of] reactors ... and elected to exclude them from antitrust review under section 105c (except in limited circumstances not present in this case)" (Pet., A-45). The Appeal Board said:

> Even if we assume *arguendo* that Section 186a means what Florida Cities assert it does, their

[10] The Commission declined to review the decision of its Appeal Board, CLI-77-26, 6 NRC 538 (1977) (Pet., A-49).

[11] *Houston Lighting & Power Company*, (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303 (1977), *appeal dismissed sub nom. Central Power and Light Company* v. *NRC*, No. 77-1654 (D.C. Cir. June 12, 1978) (Pet., A-51) (Hereafter "*South Texas*").

> cause is not advanced. The nuclear power plants in question were licensed under Section 104b. As we have already explained, by Congressional mandate antitrust considerations were not grounds for refusing operating licenses to such "research and development" facilities.

Id.

Cities petitioned the D.C. Circuit for review of the Commission's order declining to review ALAB-428 (No. 77-2101) and for review of the Director's denial of the request to initiate a show cause proceeding (No. 77-1925).

In an opinion by Circuit Judge McGowan in which Chief Judge Wright and Circuit Judge Wilkey joined, the D.C. Circuit affirmed the Appeal Board's holding that Section 186a of the Act does not authorize post-licensing antitrust review of the Section 104b operating licenses in issue. The court deliberately declined to reach the alternative ground for the Appeal Board's decision, that Section 186a does not vest the NRC with continuing antitrust authority over operating licenses since this authority is set forth exclusively in Section 105 of the Act.

REASONS WHY THE WRIT SHOULD BE DENIED

The decision below concerns the NRC's construction of a statutory grandfather clause which exempts a certain class of older reactor licenses from a special antitrust review procedure. No question of antitrust law or policy is raised. The Court of Appeals carefully avoided reaching any question of the extent of the NRC's antitrust review authority over licenses not covered by the grandfather clause, which include the

licenses for all nuclear generating facilities as to which construction commenced after 1970. There is no conflict among the circuits on the question presented here; indeed, no other dispute involving this grandfather provision has reached the courts since its enactment in 1970. In sum, the holding below is narrow in scope, and it does not produce legal or other consequences which merit this Court's review of the decision.

I. The Court of Appeals correctly decided the case.

The decision below involves a focused question of construction of the Act. The Court of Appeals simply affirmed the NRC's ruling that the Act exempts licenses issued under Section 104b from the antitrust review provisions of Section 105c.[12] The decision below is based upon explicit statutory provisions adopted against the background of a legislative history which leaves no room for doubt that Congress understood and intended to do precisely what it did.

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[12] The standard applied by the D.C. Circuit in reviewing the NRC's construction of the statute was characterized in Judge McGowan's opinion as follows:

> In the instant case, where an agency is seeking to limit its own authority in an area not within its primary realm of responsibility, we must be especially vigilant to ensure that the agency is not shirking its statutory obligations (footnote omitted).

(Pet., A-17). Whether or not application of this review standard exceeded the bounds of proper judicial review, the Court's affirmance of the agency's construction in these circumstances is all the more significant.

The 1969 *Statesville* decision of the D.C. Circuit was a germinal force behind the 1970 revision of the Act. In a concurring opinion Judge Leventhal had characterized as the "key ruling" of *Statesville* "that in the event of an intervening [finding] of practical value, the statute requires that operating licenses be issued under section 103."[13] Congress, with *Statesville* before it, went on to abolish the "practical value" requirement. It then focused directly upon whether, as Judge Leventhal suggested, holders of extant licenses issued under Section 104b should be required to apply for operating licenses under Section 103. It deliberately adopted what the Court below characterized as a "grandfather clause,"[14] Section 102b, which provides that "any license hereafter issued for a . . . facility . . . , the construction or operation of which was licensed pursuant to subsection 104b, prior to enactment into law of this subsection, shall be issued under subsection 104b."

There can be no doubt that Congress, by adopting Section 102b, meant to exempt Section 104b licenses from the antitrust review provisions of the Act. This is clear from the report of the Joint Committee on Atomic Energy and, as the Court of Appeals noted, from the "tone of the hearings leading to enactment of the 1970 amendments."[15] Moreover, Congress si-

[13] 441 F.2d at 984 (Leventhal, J., concurring).

[14] Pet., A-21

[15] Pet., A-22. The decision below found especially persuasive the following language from the Joint Committee Report:

> [I]t would impose an unnecessary hardship on subsection 104b licensees to compel them to convert their permits to section 103 licenses; the matter of potential antitrust review of certain subsection 104 licenses is specifically dealt with in section [105c(3)], and is discussed below, and it appears to the committee that no useful purpose could be served by compelling any conversion to section 103.

JOINT COMMITTEE ON ATOMIC ENERGY, REPORT TO ACCOMPANY H.R. 18679, H.R. REP. NO. 19-1470, 91st Cong. 2d Sess. 26-27 (1970), quoted in the decision below at Pet., A-21.

multaneously adopted a specific provision, Section 105c(3), 42 U.S.C. §2135(c)(3), subjecting certain applications under Section 104b, not including any of FPL's licenses, to antitrust review notwithstanding the "grandfather" clause.

Florida Cities' argument is based on Section 186a of the Act, 42 U.S.C. §2236, which allows the NRC to revoke a license for "conditions revealed . . . which would warrant the Commission to refuse to grant a license on an original application. . . ." The D.C. Circuit properly disposed of the argument as follows:

> The legislative history of the grandfather clause suggests to us that Congress, by creating an exemption from the general requirement of prelicensing antitrust review, deliberately chose to single out section 104(b) licensees, such as FP&L, for special treatment in obtaining operating licenses. Inasmuch as the "conditions revealed" clause of Section 186(a) is framed specifically in terms of the standards governing original license applications, we think it would be anomalous to interpret section 186(a) as authorizing postlicensing antitrust review under section 103 standards of the section 104(b) licenses at issue here, which, when reviewed as original license applications, were accorded by congressional mandate a special exemption from antitrust review. Accordingly, we reject Florida Cities' interpretation of the "conditions revealed" clause under which, for the purposes of license revocation, section 104(b) licenses would be treated as section 103 licenses.

Pet., A-22.

The intent of Congress to exempt this class of licenses from the Section 105c antitrust review is beyond reasonable dispute. Moreover, once the exemption is recognized, the validity of the D.C. Circuit's construction of Section 186a is plain.

It was because this interpretation of the Act was so compelling that the D.C. Circuit found it possible to avoid deciding an issue which it apparently believed to be more complex. The NRC had also denied the Florida Cities' request on a second ground—on the basis of its *South Texas* decision, which holds that the NRC's antitrust review functions are to be discharged in connection with the NRC's licensing functions and that the NRC is not vested with a continuing antitrust review or enforcement function.

In *South Texas*, the NRC carefully analyzed the Act, with emphasis on the interplay between the specific antitrust provisions of Section 105 as amended in 1970 and the general grant of authority in Section 186a. The NRC found Section 105 striking in its "specificity and completeness," in that it addresses the NRC's antitrust responsibilities in all foreseeable circumstances.[16] It examined the legislative history of Section 105 and its predecessors, focusing particularly on the legislative history surrounding the rewriting of Section 105c in 1970, and found overwhelming support for the view that the antitrust review functions of Section 105c were to be "prelicensing" or "anticipatory" in nature. 5 NRC at 1314 (Pet., A-67). The Commission noted that Section 186a was one of many examples of provisions which endow the NRC with "expansive health and safety jurisdiction, which continues through the lives of outstanding licenses," and concluded that, in circumstances where the generality of Section 186a could not be reconciled with the specificity of Section 105, "the Commission's antitrust authority is defined not by the broad powers contained in Section 186, but by the more limited scheme set forth in Section 105."[17]

[16] 5 NRC at 1312 (Pet., A-64).

Obviously the question presented in this proceeding cannot be resolved favorably to Petitioners unless both of the independent grounds for the result reached by the court below and the Commission are determined to be in error. For this reason FPL respectfully submits that if this court decides to grant the writ it should address both of those grounds.

II. The decision below creates no exemption from operation of the antitrust laws.

Florida Cities imply that the decision below will permit violations of the antitrust laws to continue unchecked.[18] This argument is baseless. The Act itself provides that "[n]othing contained in this Act shall relieve any person from the operation of the [antitrust

[17] 5 NRC at 1316, 1317 (Pet., A-71, A-73). The Commission found it impossible to square the continuing antitrust jurisdiction argument with provisions of Section 105 which specify that the Commission may revoke a license on the basis of a court finding of violation of the antitrust laws "in the conduct of the licensed activity" (Section 105a), and which limit the circumstances in which a further antitrust review (additional to that conducted in connection with the construction permit application) can be conducted at the stage of an application for an operating license (Section 105c(2), 42 U.S.C. §2135(c)(2)). 5 NRC at 1317 (A-73).

[18] Pet., 18, 28.

laws]." Section 105a, 42 U.S.C. §2135(a). Florida Cities made the same argument to the D.C. Circuit, which disposed of it as follows:

> To so immunize the licenses at issue from post-licensing antitrust review under section 186(a) is not, as Florida Cities assert, to give FP&L a "carte blanche to use [its] facilities directly contrary to the antitrust laws." Section 105(a) not only provides that nothing in Act preempts the normal operation of the antitrust laws, but also vests the Commission with authority to revoke or modify FP&L's operating licenses in the event that a court finds that FP&L has violated those laws in the course of licensed activity. Moreover, the Commission, acting pursuant to section 105(b), has already forwarded Florida Cities' antitrust allegations to the Justice Department.

Pet., A-30-31.

This case does not involve any question of exempting persons or activities from operation of the antitrust laws.

III. The decision below does not significantly reduce the impact of the NRC's antitrust review activities.

The Petition suggests that the result below exempts "a major portion of the electric power industry" from NRC antitrust scrutiny (Pet., 10), and, to bolster this assertion, details the number and percentages of operating licenses issued under Section 104b as compared with Section 103. These statistics create a misimpression which belies the broad impact which the NRC antitrust review process has already had on the electric utility industry.

As of three years ago, the NRC estimated that companies responsible for 76% of the total kilowatt-hour electricity sales in the United States had been subjected to antitrust review under Section 105c.[19] This review is usually conducted at the construction permit stage of a license application. Act, Section 105c(1), 42 U.S.C. §2135(c)(1). Petitioners' statistics reach only plants actually licensed to operate, and ignore the many Section 103 license applications "in the pipeline" which have already been subject to antitrust review at the construction permit stage, but have not yet progressed to issuance of an operating license.

In practice, the NRC's antitrust reviews have included, in each instance, a wide-ranging evaluation of the relationship of the facility under consideration to the applicant's total system or power pool.[20] License conditions have been imposed, by agreement or order upon hearing, which are designed to remedy allegedly anticompetitive aspects of an applicant's electric operations in general.[21]

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[19] Testimony of Jerome Saltzman, Chief, Antitrust and Indemnity Group, Office of Nuclear Reactor Regulation, NRC, THE COMPETITION IMPROVEMENTS ACT OF 1975: HEARINGS BEFORE THE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY OF THE SENATE JUDICIARY COMMITTEE, S. 2028, 94th Cong., 1st Sess. 202 (1976).

[20] *See Louisiana Power & Light Co.* (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 621 (1973).

[21] *See* D. PENN, J. DELANEY AND T. HONEYCUTT, THE U.S. NUCLEAR REGULATORY COMMISSION'S ANTITRUST REVIEW OF NUCLEAR POWER PLANTS: THE CONDITIONING OF LICENSES (1976), AND J. DELANEY, T. HONEYCUTT, AND M. MESSIER, ANTITRUST REVIEW OF NUCLEAR POWER PLANTS (1978), for a complete description of the results of all 105c antitrust reviews to date of publication, including a list of conditions imposed.

Thus, the effect of the NRC's and D.C. Circuit's decision below is relatively narrow. The great majority of utilities which hold licenses issued under Section 104b have subsequently submitted applications for licenses under Section 103, and have been, or are being, subjected to antitrust review in the context of those later applications. The exemption of the 104b licenses from NRC antitrust review affects only the arrangements associated with the exempted facilities, and, as to these, no exemption from operation of the antitrust laws is established or implied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1898

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

NEWMAN OIL COMPANY, et al.,
Respondents.

REPLY BRIEF OF PETITIONER ATLANTIC RICHFIELD COMPANY

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August 21, 1979

TABLE OF AUTHORITIES

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REPLY BRIEF OF PETITIONER ATLANTIC RICHFIELD COMPANY

The Brief In Opposition by Plaintiffs (Respondents in this Court and Appellants in the Temporary Emergency Court of Appeals) maintains that the petitions for writ of certiorari by Atlantic Richfield Company (No. 78-1898) and by Albert B. Alkek and Foremost Petroleum Corporation, Inc. (No. 78-1906) intentionally disregard Plaintiffs' supposed federal cause of action under 10 C.F.R. § 205.203(f), for which reason the petitions for writ of certiorari assertedly should be denied as "wholly without merit."

The assertion of an express and/or implied private cause of action under 10 C.F.R. § 205.203(f) is a reiteration of exactly the same argument made by the Plaintiffs to the Temporary Emergency Court of Appeals. *See* Appellants' Post-Submission Brief. However, the opinion and decision by the Temporary Emergency Court of Appeals eschewed holding that such a private cause of action exists, and construed the claims by Plaintiffs as merely "involving common-law fraud." *See* Opinion p. 6 (A-7)[1]. As the Reply

[1] All appendix page references in this Reply Brief are to the Appendix in the Petition for a Writ of Certiorari previously filed by Atlantic Richfield Company.

Memorandum of Petitioners Albert B. Alkek and Foremost Petroleum Corporation, Inc. in this Court ably demonstrates (which Reply Memorandum Atlantic Richfield Company generally adopts and incorporates herein), such a supposed cause of action based on 10 C.F.R. § 205.203(f) was never properly raised by the Plaintiffs in their trial court pleadings, has never received recognition or approval by either the trial court or the Temporary Emergency Court of Appeals, and fails as a matter of law to support Plaintiffs' complaint of price overcharges.

Even more fundamentally, Plaintiffs' argument still directly conflicts with this Court's decision in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), the case on which the petitions both of Atlantic Richfield Company (No. 78-1898) and of Albert B. Alkek and Foremost Petroleum Corporation, Inc. (No. 78-1906) are principally based.

Plaintiffs' theory of liability, as expressed in Respondents' Brief in Opposition, alleges that the Petitioners fraudulently obtained the Plaintiffs' signatures on the three-party agreements [*see* Three-Party Agreement (Model), at A-29 to A-31]. Plaintiffs further state that the three-party agreements were submitted to the Federal Energy Administration, which then ordered that Foremost Petroleum Corporation, Inc. would become the new supplier for the Plaintiffs. This order by the FEA, Plaintiffs maintain, allowed Foremost Petroleum Corporation to charge the Plaintiffs a higher regulated price than the price which Atlantic Richfield had formerly been allowed by the regulations to charge the Plaintiffs. *See* Respondents' Brief In Opposition, p. 7.

By the express terms of the three-party agreements, Foremost Petroleum Corporation, Inc. was to be designated

as the Plaintiffs' new supplier pursuant to 10 C.F.R. § 211.9(a)(2)(i), which provides as follows:

> Unless otherwise provided in this part or directed by FEA, the supplier/wholesale purchaser-reseller relationships defined by specific dates or base periods or otherwise imposed pursuant to this part shall be maintained for the duration of the Mandatory Petroleum Allocation Program and may not be waived or otherwise terminated without the express written approval of FEA.

The law is quite clear that any changes in the supplier/wholesale purchaser-reseller relationships ordered by FEA are discretionary acts by the Agency. *Amtel, Inc. v. FEA*, 536 F.2d 1378 (TECA 1976).[2] For this reason Plaintiffs'

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[2] As stated in *Amtel, Inc. v. FEA, supra,*

> By requiring the attainment of the specified objectives of the Allocation Act "to the maximum extent *practicable*" (emphasis added), 15 U.S.C. § 753(b)(1) (1976 Supp.), Congress recognized that the objectives were to a certain extent inconsistent and intended that the FEA would exercise its discretion in achieving a workable balance among them.

536 F.2d at 1383.

> [S]uch cases are only episodes in the evolution of adjustment among private interests and in the reconciliation of all these private interests with the underlying public interest in such a vital source of energy for our day as oil. Certainly so far as the federal courts are concerned the evolution of these formulas belongs to the Commission and not to the judiciary. A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted. * * * It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better.

536 F.2d at 1384, quoting from *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 310 U.S. 574, 580-584 (1940)

contention that the FEA did not exercise its discretionary authority in replacing Atlantic Richfield Company as Plaintiffs' supplier (and according to Plaintiffs, increasing the maximum price chargeable to Plaintiffs) cannot be sustained.

As in *Montana-Dakota*, Plaintiffs are caught between Scylla and Charibdis. To the extent that the Plaintiffs maintain that the FEA's designation of Foremost Petroleum Corporation, Inc. as the Plaintiffs' new supplier was the cause of the increased charges ("injury") to the Plaintiffs, *Montana-Dakota* forbids any court (federal or state) from invading the agency's discretionary jurisdiction by speculating as to what action the FEA would have taken absent the alleged fraud.[3] If the Plaintiffs were to maintain that the FEA's orders were not the cause of their injury, their cause of action would be one merely for common-law fraud, which *Montana-Dakota* requires be brought in state court, absent diversity of citizenship jurisdiction. In neither instance would the federal courts now have jurisdiction over the Plaintiffs' cause of action.

The Temporary Emergency Court of Appeals has been misled into violating this Court's decision in *Montana-Dakota*. If federal courts are to avoid infringing the exclusive discretionary jurisdiction of federal agencies and the common-law jurisdiction of state courts, the door opened by the Temporary Emergency Court of Appeals in this case must be closed now by this Court.

[3] That the FEA had the power to substitute Foremost Petroleum Corporation, Inc. for Atlantic Richfield Company, without Plaintiffs' consent, is clear. *See, e.g.*, 10 C.F.R. § 211.14(d).

For the reasons stated previously, the petition for writ of certiorari should be granted.

Respectfully submitted,

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